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No.

IN THE

Supreme Court of the United States

JAMES L. CHEESEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court established a gross-disproportionality standard to determine whether a punitive forfeiture violates the Excessive Fines Clause of the Eighth Amendment. In the twelve years since that decision, lower courts have exhibited considerable confusion in applying this standard and have taken differing approaches to it, particularly with respect to the weight to be given the United States Sentencing Guidelines in determining the gravity of a defendant's offense.

In determining the gravity of an offense for the purposes of a *Bajakajian* gross-disproportionality analysis, should courts give the range of fines prescribed by the United States Sentencing Guidelines greater weight than the maximum fine allowed by statute?

Did the decision below contradict this Court's instructions in *Bajakajian* and violate the Excessive Fines Clause by imposing a $500,000 forfeiture of sporting-goods store inventory for a single violation of 18 U.S.C. § 922(g)(3), for which the Sentencing Guidelines maximum fine was $75,000 and the statutory maximum fine was $250,000?

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James L. Cheeseman respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 600 F.3d 270. App. 1a. The opinion of the United States District Court for the District of Delaware is reported at 593 F. Supp. 2d 682. App. 33a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment. The court of appeals filed its opinion on March 2, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section 922(g)(3) of Title 18 of the United States Code, which provides in pertinent part:

> It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Finally, this case involves Section 924(d)(1) of Title 18 of the United States Code, which provides in pertinent part:

> Any firearm or ammunition involved in or used in any knowing violation of subsection . . . (g) . . . of section 922 . . . shall be subject to seizure and forfeiture . . . .

STATEMENT

A. The Excessive Fines Clause and *United States v. Bajakajian*

This case asks the Court to revisit and clarify its jurisprudence on the limits that the Excessive Fines Clause of the Eighth Amendment places on forfeitures of property.

For most of the nation's history, this Court had no occasion to apply the Excessive Fines Clause. In recent decades, however, government at all levels has increasingly used asset forfeiture as a weapon against crime, giving the Excessive Fines Clause renewed relevance. Thus, during the 1990s, this Court decided several cases addressing how that provision limits the government's power to take property as punishment for a crime.

In 1993, this Court issued its first two decisions placing limits on forfeitures under the Excessive Fines Clause. In *United States v. Austin*, the Court held that punitive *in rem* forfeitures are subject to review under the Excessive Fines Clause. 509 U.S. 602 (1993). In *United States v. Alexander*, the Court held that criminal forfeitures are also subject to Excessive Fines Clause scrutiny and that an Excessive Fines Clause challenge must be analyzed separately from a Cruel and Unusual Punishments Clause challenge. 509 U.S. 544 (1993).

Some five years later, this Court established the standard to be used to determine whether a forfeiture violates the Excessive Fines Clause, in *United States v. Bajakajian*, 524 U.S. 321 (1998).

In *Bajakajian*, the defendant was convicted of violating 31 U.S.C. § 5316(a)(1)(A), which requires travelers to inform the government when taking

more than $10,000 in currency out of the country, after he lied to customs inspectors who caught him attempting to take $357,144 on an international flight. *Id.* at 324-25. The government sought forfeiture of the full cash amount, as 18 U.S.C. § 982(a)(1) provides, but the district court limited the forfeiture to $15,000 on the ground that the full amount would be unconstitutionally excessive. *Id.* at 326.

In analyzing whether the full forfeiture would constitute an excessive fine, this Court adopted the standard of gross disproportionality, under which courts "must compare the amount of the forfeiture to the gravity of the defendant's offense." *Id.* at 336-37.

Applying that standard, this Court looked at the specific characteristics of Bajakajian's offense and concluded that its gravity was minimal. The Court observed this his crime was "solely a reporting offense." *Id.* at 337. It noted that his violation "was unrelated to any other illegal activities" and involved "the proceeds of legal activity," which he intended to use "to repay a lawful debt." *Id.* at 338. The Court further noted that Bajakajian did "not fit into the class of persons for whom the statute was principally designed" because he was "not a money launderer, a drug trafficker, or a tax evader." *Id.* And, the Court observed, "under the Sentencing Guidelines, the maximum sentence that could have been imposed on respondent was six months, while the maximum fine was $5,000," which "confirm[s] a minimal level of culpability." *Id.* at 338-39. Finally, the Court considered that the harm the defendant caused was minimal: if he had gotten away with his crime, the only harm would have been the government's loss of the information. *Id.* at 339.

Thus, the Court concluded that a $357,144 forfeiture was grossly disproportional to Bajakajian's offense. The forfeiture was "larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it [bore] no articulable correlation to any injury suffered by the Government." *Id.* at 340.

Since *Bajakajian*, this Court has provided no further clarification of its Excessive Fines Clause gross-disproportionality standard. Instead, lower courts have struggled to determine how to apply it, and in doing so they have differed significantly. In particular, courts have disagreed over whether courts should give fines prescribed by the Sentencing Guidelines greater weight than the maximum fine allowed by statute.

B. Factual Background

Petitioner James L. Cheeseman began operating a sporting-goods store, X-Ring Supply, as a sole proprietor in 1994. App. 4a. His store typically maintained an inventory of about 700 firearms, and for this purpose Mr. Cheeseman held a federal firearms license ("FFL"). App. 36a.

After his wife left him in 2003, Mr. Cheeseman began abusing drugs, which ultimately included crack cocaine. App. 4a. Because of his drug problem, Mr. Cheeseman eventually gave power of attorney to one of his sisters, who, with another individual, then took over the store's daily operation. App. 5a. In June 2007, Mr. Cheeseman entered a rehabilitation center to treat his addiction. App. 39a.

One day in August 2007, after Mr. Cheeseman left rehabilitation and relapsed into addiction, police noticed Mr. Cheeseman and a companion in a drug-store parking lot. Mr. Cheeseman consented to a pat-

down search, and officers found crack cocaine and related paraphernalia. App. 40a.

Later that month, federal agents executed a search warrant at the store and seized 609 firearms, worth about $500,000, the overwhelming majority of which were part of the store's inventory. App. 5a, 40a-41a. In a warehouse separate from the store, which Mr. Cheeseman used as a living space, agents found more evidence of Mr. Cheeseman's drug use, along with some ammunition stored there, but no firearms. App. 40a-41a. The district court noted that Mr. Cheeseman's then-girlfriend, who was purportedly a drug user as well, would stay with him there, and that he at times disabled its security system. App. 37a & n.4. After the firearms' seizure, Mr. Cheeseman sold the store to his two sisters. App. 42a.

As the Third Circuit noted, "[t]here is no evidence in the record suggesting that Cheeseman actively employed the firearms or traded his firearms to drug dealers." App. 15a. Indeed, there is no record evidence that Mr. Cheeseman or any other drug user actually used the weapons; about ninety percent of the firearms were simply store inventory, and the rest were collector's items, including valuable antiques.

C. Proceedings Below

Before the district court, Mr. Cheeseman pled guilty to a single count of violating 18 U.S.C. § 922(g)(3), which makes it unlawful for any person "who is an unlawful user of or addicted to any controlled substance . . . to . . . possess in or affecting commerce, any firearm or ammunition."

The government then sought forfeiture of the firearms seized from Mr. Cheeseman's store under 18 U.S.C. § 924(d)(1), which provides for forfeiture of "any firearm or ammunition involved in or used in any knowing violation" of § 922(g). The district court held a hearing to determine whether forfeiture of the entire inventory would constitute an excessive fine, concluded that it would not, and ordered the forfeiture. App. 44a-45a.

At sentencing, the court noted that Mr. Cheeseman had made major rehabilitative efforts and that "the chances of his repeating the conduct of conviction are slim to none," and therefore granted a downward variance from the Sentencing Guidelines, sentencing him to time served (eight months), with no further jail time and no fine.

On appeal, the Third Circuit affirmed the forfeiture, concluding that it was not grossly disproportional to Mr. Cheeseman's offense. The court opined that here, in contrast with *Bajakajian*, Mr. Cheeseman's offense "was not the only illegality associated with" his crime because he abused illegal drugs. App. 28a. The Third Circuit held that, as a drug user with "unfettered access" to weapons, who allowed others to have the same access by being with him in the warehouse, Mr. Cheeseman was "within the class of persons whose behavior the statute aims to criminalize." App. 28a-29a. The court disregarded Mr. Cheeseman's "contention that he legally owned and operated a firearms dealership for many years" because "he was abusing drugs during his ownership of X-Ring," and because of his "misrepresentation on his FFL application," which required him to certify that he did not use illegal drugs. App. 28a-29a.

The court gave little weight to the disproportion between Mr. Cheeseman's $500,000 forfeiture and his Guidelines fine range of $7,500 to $75,000. Because of the circumstances surrounding the offense and because the forfeiture was "less than seven times greater than the high end of his Guidelines range," the court concluded that the disproportionality did "not sufficiently outweigh the remaining factors that militate against a finding of unconstitutionality." App. 29a.

Finally, the court addressed the statutory maximum:

> [A]s noted in *Bajakajian*, the Guideline fine alone is not dispositive and we may also consider the statutory maximum fine that Cheeseman faced. *See* [*Bajakajian*, 524 U.S.] at 339 n.14. Here, the statutory maximum fine was $250,000. Thus, a forfeiture valued at $500,000 is only two times greater than the maximum fine permitted by the statute. Thus, any discrepancy between the value of the firearms and the Guideline fine is not controlling and therefore does not serve as the basis for finding an Excessive Fines Clause violation.

App. 29a-30a (internal citation omitted).

This petition seeks review of the court of appeals' interpretation and application of the *Bajakajian* gross-disproportionality analysis.

REASONS FOR GRANTING THE PETITION

The decision below reflects a conflict among the circuit courts over how to conduct the gross-disproportionality analysis that this Court prescribed in *United States v. Bajakajian*, 524 U.S. 321 (1998) for determining whether a forfeiture violates the Excessive Fines Clause.

Specifically, the courts are split over how much weight courts should give to the United States Sentencing Guidelines in determining the gravity of a defendant's offense. Some circuits have held that the Guidelines should receive greater weight than a defendant's statutory maximum fine; other circuits have given the Guidelines little or no weight.

This conflict is important because courts that give greater weight to the Guidelines subject forfeitures to considerably greater scrutiny than courts that do not. The difference between a defendant's Guidelines fine range and his statutory maximum is often substantial, and this factor can be decisive in a court's gross-disproportionality analysis, especially where a defendant's culpability is low and the risk of an excessive fine is greatest.

The courts that give the Guidelines less weight disregard *Bajakajian*'s requirement of an individualized analysis and provide minimal protection against excessive forfeitures. Like the Third Circuit in this case, they can dispose of practically any Excessive Fines Clause challenge, even if a forfeiture far exceeds a defendant's Guidelines range, by pointing to a high default statutory maximum and concluding that the defendant's forfeiture is not grossly disproportional to it.

This case is therefore not only about the injustice of Mr. Cheeseman's forfeiture; it is about the approach that courts should take in any Excessive Fines Clause case to ensure that individuals in all jurisdictions receive equal treatment under the Eighth Amendment. Of course, this Court cannot anticipate or correct every misapplication of the Excessive Fines Clause, and "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Bajakajian*, 524 U.S. at 336. Nonetheless, this Court can clarify the principles that should guide the courts when they make these determinations – and the contradictory approaches of the lower courts demonstrate that this clarification is necessary.

I. The Circuits are divided over the weight to be given to the United States Sentencing Guidelines in an Excessive Fines Clause analysis.

A. Lower courts are in conflict regarding whether to give the Guidelines greater weight than a statutory maximum in determining whether a forfeiture is grossly disproportionate to an offense.

The lower courts are in conflict regarding how much weight to give the United States Sentencing Guidelines relative to a statutory maximum in assessing the gravity of an offense to determine whether a forfeiture is grossly disproportional and violates the Excessive Fines Clause.

1. *Bajakajian* looked to the Guidelines.

The Sentencing Guidelines factored prominently in this Court's analysis in *Bajakajian*.

In assessing the gravity of Bajakajian's offense, the Court observed that "under the Sentencing Guidelines, the maximum sentence that could have been imposed on respondent was six months, while the maximum fine was $5,000. Such penalties confirm a minimal level of culpability." *Bajakajian*, 524 U.S. at 338-39 (internal citations omitted).

The Court said nothing about the statutory maximum, except in a footnote responding to points made by the government and by a dissent:

> In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence. Here, as the Government and the dissent stress, Congress authorized a maximum fine of $250,000 plus five years' imprisonment for willfully violating the statutory reporting requirement, and this suggests that it did not view the reporting offense as a trivial one. That the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized, however, undercuts any argument based solely on the statute, because they show that respondent's culpability relative to other potential violators of the reporting provision – tax evaders, drug kingpins, or money launderers, for example – is small indeed.

Id. at 339 n.14.

2. Many courts have concluded that *Bajakajian* instructs them to give greater weight to the Guidelines than to a statutory maximum.

Several Circuit courts have concluded that *Bajakajian* instructs them to give the Guidelines greater weight than a statutory maximum in conducting a gross-disproportionality analysis.

The First Circuit, for example, has stated that "*Bajakajian* . . . suggests that the maximum penalties provided under the Guidelines should be given greater weight than the statute because the Guidelines take into consideration the culpability of the individual defendant," and has accordingly given the Guidelines greater weight. *United States v. Beras*, 183 F.3d 22, 27 n.5 (1st Cir. 1999).

Similarly, the Second Circuit has held that the "statutory maximum, designed as an outer limit on the punishment available, does not necessarily reflect an individual offender's culpability or the gravity of the actual offense giving rise to forfeiture. Providing ranges of punishment with greater particularity, the Guidelines allow us to better determine proportionality and to evaluate a claimant's culpability relative to other potential violators of the federal narcotics laws." *Von Hofe v. United States*, 492 F.3d 175, 187 (2d Cir. 2007).

The Ninth Circuit has likewise held that the Guidelines are to be given priority. *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1198 (9th Cir. 1999).

Some federal district courts in Circuits where the Court of Appeals has not addressed this issue have also concluded that the Guidelines should receive

greater weight. *See United States v. Fifty-Nine Thousand Dollars in U.S. Currency*, No. 06-60573-CIV-COHN, 2009 U.S. Dist. LEXIS 122333, at *9 (S.D. Fla. Dec. 10, 2009) (stating, after a remand from the Eleventh Circuit for failing to consider the Guidelines at all, that "the guidelines range is the single most important factor considered by this Court"); *United States v. One Parcel of Prop.*, No. 2:04CV750, 2006 U.S. Dist. LEXIS 15617, at *18 (M.D. Ala. Apr. 3, 2006) ("[T]he guidelines fine range is the more reasonable factor to be considered in determining excessiveness."); *United States v. One 1997 Ford Expedition Util. Vehicle*, 135 F. Supp. 2d 1142, 1147-48 (D. N.M. 2001) (adopting the view that "the Guidelines, which are more closely tailored to the specific crime underlying a forfeiture, are a better measure for purposes of the proportionality analysis" because *Bajakajian* "seemed to indicate this" and "it is likely the Tenth Circuit would also adopt this approach").

Experts have also taken the view that *Bajakajian* called for courts to give primary consideration to the Guidelines. For example, one scholar concluded that this Court "looked to the United States Sentencing Guidelines, rather than to the statutory maxima, as a relevant 'objective' indicator of offense seriousness . . . [because] the latter encompasses a broad range of offense conduct and thus is a less reliable indicator of the seriousness of the particular offender's conduct than are the guidelines, which are designed to provide a more refined evaluation of the conduct of particular offenders." Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000

U. Ill. L. Rev. 461, 494 (2000); *see also* Jimmy Gurulé et al., 1-10 *Law of Asset Forfeiture* § 10-2 (2004) (stating that courts looking to the Guidelines rather than a statutory maximum were "following *Bajakajian*'s lead"); David B. Smith, 1-12 *Prosecution and Defense of Forfeiture Cases* P 12.11 (2009) ("The [Court] took a realistic and practical approach in looking to the guidelines [rather than the statutory maximum] for an appropriate benchmark.").

3. Other courts have not given the Guidelines greater weight than the statutory maximum, and some have disregarded the Guidelines entirely.

Despite the apparent consensus among the above authorities, not all courts have given such primacy to the Sentencing Guidelines, including the Third Circuit in this case.

Here, the Third Circuit gave minimal weight to Mr. Cheeseman's Guidelines fine range. The court acknowledged that his $500,000 forfeiture was nearly seventy times greater than the low end of the range, but added that it was "less than seven times greater than the high end," and that "the Guideline fine alone is not dispositive and [the Court] may also consider the statutory maximum fine that Cheeseman faced." App. 29a. The court then observed that Mr. Cheeseman's forfeiture is "only two times greater than the maximum fine permitted by the statute." App. 29a-30a. Thus, it concluded, "any discrepancy between the value of the firearms and the Guideline fine is not controlling and therefore does not serve as the basis for finding an Excessive Fines Clause violation." App. 30a.

The Third Circuit's approach in this case is consistent with its approach in another recent decision, in which it concluded in a cursory analysis that the defendant's $100,000 fine was not excessive because it was "not disproportionate to the statutory maximum fine of $ 250,000 per offense," making no reference to the Guidelines. *United States v. Rico-Hernandez*, 350 Fed. Appx. 653, 655 (3d Cir. 2009).

The Fourth Circuit has shown a similar disregard for the Guidelines in its gross-disproportionality analysis. Rejecting an Excessive Fines Clause challenge, it distorted this Court's approach by incorrectly stating that *Bajakajian* "determin[ed] a forfeiture's proportionality by its relation to the maximum sentence and fine that could be imposed and the harm that the victim suffered." *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003). It quoted with approval a trial court's statement that "the [$250,000] statutory maximum exposure of this defendant in connection with these kinds of charges . . . tells you what the seriousness of the offense or the gravity of the offense is considered to be." *Id.* Neither the district court (as quoted) nor the Fourth Circuit made any reference to the defendant's Guidelines range. The Fourth Circuit's opinion did note elsewhere that the defendant's offense level was 14, which means that his Guidelines fine range would have been just $4,000 to $40,000. *Id.* at 340; U.S. Sentencing Guidelines Manual § 5E1.2(c)(3).

The Sixth Circuit has held, post-*Bajakajian*, that "there is no constitutional violation when the forfeiture does not exceed the maximum fine allowed by statute," which means that in any such

case, the Guidelines will receive no consideration. *United States v. Hill*, 167 F.3d 1055, 1072-73 (6th Cir. 1999). Although a later Sixth Circuit decision called for consideration of all the *Bajakajian* factors, it did not explicitly overrule *Hill*.[1] *United States v. Carpenter*, 317 F.3d 618, 626-28 (6th Cir. 2003), *reheard en banc on other grounds and reinstated*, 360 F.3d 591 (6th Cir. 2004). Thus, *Hill* apparently remains binding in the Sixth Circuit. *See United States v. Warshak*, No. 1:06-CR-00111, 2008 U.S. Dist. LEXIS 61130, at *17 (S.D. Ohio July 8, 2008) ("Under Sixth Circuit precedent, when the amount to be forfeited amounts to less than the maximum statutory fine for the underlying criminal offense, no Eighth Amendment concerns are triggered.").

B. This conflict is important because individuals receive substantially less protection against excessive forfeitures in jurisdictions that do not give weight to the Guidelines.

The difference in the courts' treatment of the Sentencing Guidelines is important because jurisdictions that do not give greater weight to the Guidelines provide individuals with far less protection against excessive forfeitures.

Although this factor is just one of several in *Bajakajian*, it may often be decisive, especially in

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[1] Indeed, it could not have overruled *Hill* because it was not an en banc decision. *See United States v. Barnwell*, 477 F.3d 844, 851 n.4 (6th Cir. 2007) ("Only [an] en banc court may overrule a circuit precedent, absent an intervening Supreme Court decision.").

courts that downplay the Guidelines. In federal cases, a defendant's statutory maximum often will far exceed his Guidelines maximum. As one treatise put it: "If the statutory maxima are used as the benchmark, then virtually all forfeitures escape excessiveness review because, at least in federal cases, the statutory maximum fines are usually enormous even if there is only one count of conviction." Smith, *supra*, P 12.11.

Thus, in jurisdictions that give primacy to the Guidelines, a defendant with low culpability and an accordingly low Guidelines fine range may succeed on an Excessive Fines Clause challenge to a very large forfeiture even if the amount is not many times greater than, or is even less than, the statutory maximum fine. *See, e.g., United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121-22 (9th Cir. 2004) ($100,348 forfeiture excessive where Guidelines maximum was $30,000 and statutory maximum was $250,000); *Beras*, 183 F.3d at 28-29 (on plain-error review, $138,794 forfeiture excessive where Guidelines maximum was $30,000 and statutory maximum was $250,000); *3814 NW Thurman St.*, 164 F.3d at 1197-98 ($200,686.18 forfeiture excessive where Guidelines maximum was $5,000 and statutory maximum was $1,000,000); *One Parcel of Prop.*, 2006 U.S. Dist. LEXIS 15617, at *18-19 ($102,000 forfeiture excessive where Guidelines maximum was $5,000 and statutory maximum was $500,000).

In jurisdictions that do not give primacy to the Guidelines, however, it is doubtful that a defendant or claimant would ever succeed with an Excessive Fines Clause challenge under comparable circumstances. Here, for example, the Third Circuit

apparently found it compelling, if not conclusive, that Mr. Cheeseman's forfeiture was "only" two times greater than the statutory maximum fine intended for the worst offenders. App. 29a-30a.

In fact, it appears that, since *Bajakajian*, courts in Circuits that downplay the Guidelines have not rejected *any* penalty under the Excessive Fines Clause, apart from three trial-court decisions, one of which did consider only the Guidelines, and all of which had circumstances that make their precedential value especially low. *See United States v. Ford Motor Co.*, 442 F. Supp. 2d 429, 435-37 (E.D. Mich. 2006) (fine excessive in civil customs case; Guidelines inapplicable); *United States v. $120,856 in U.S. Currency*, 394 F. Supp. 2d 687, 692-95 (D.V.I. 2005) ($120,856 forfeiture excessive on facts substantially identical to *Bajakajian*'s; considered only the Guidelines; predates Third Circuit decisions); *United States v. Kruse*, 101 F. Supp. 2d 410, 412-14 (E.D. Va. 2000) (holding that "even if" the Eighth Amendment applies to fine under anti-kickback statute, $1,569,120 not excessive, though an additional $590,000 would be; no analysis of *Bajakajian* factors or explanation of why additional amount is excessive; predates Fourth Circuit decision).

Therefore, to ensure that individuals across all jurisdictions receive the same level of Eighth Amendment protection, this Court should grant certiorari and clarify the law.

II. The decision below is incorrect.

A. The Third Circuit erred by failing to give the Sentencing Guidelines the weight they are due.

By failing to give appropriate weight to the Sentencing Guidelines, the Third Circuit denied Mr. Cheeseman the individualized consideration that *Bajakajian* and the Eighth Amendment require and affirmed an excessive fine.

Courts that have given the Guidelines primacy have provided a sound reason for doing so: because the Guidelines account for an individual defendant's culpability relative to other violators of the same statute, while the statutory maximum is an outer limit intended only for the most serious offenders. *See, e.g.*, *Beras*, 183 F.3d at 29 n.5; *Von Hofe*, 492 F.3d at 187.

Courts that apply this reasoning are following *Bajakajian*'s example. This Court's gross-disproportionality analysis focused on the particular defendant's "culpability relative to other potential offenders" of the same statutory provision. *Bajakajian*, 524 U.S. at 339 n.14. It would have made no sense to compare the forfeiture to the fine that could be imposed on "tax evaders, drug kingpins, or money launderers" because what is appropriate for them, as the worst offenders, may not be (and indeed was not) appropriate for Bajakajian as one of the least culpable offenders. *Id.* And the means by which the Court confirmed that Bajakajian was among the least culpable offenders was by looking to the Guidelines.

True, the Court noted that the statutory maximum is "relevant evidence." *Id.* But in

Bajakajian it was relevant to provide contrast between the defendant's offense – which the Guidelines said warranted (at most) a $5,000 fine – and the offenses committed by the statute's worst violators, which the statute said warranted (at most) a $250,000 fine.

In this case, however, the Third Circuit considered the statutory maximum in quite a different manner:

> Here, the statutory maximum fine was $250,000. Thus, a forfeiture valued at $500,000 is only two times greater than the maximum fine permitted by the statute. Thus, any discrepancy between the value of the firearms and the Guideline fine is not controlling and therefore does not serve as the basis for finding an Excessive Fines Clause violation.

App. 29a-30a (internal citation omitted). Contrary to the Third Circuit's implication, nothing in *Bajakajian* suggests that a forfeiture that is "only" double the statutory maximum does not violate the Excessive Fines Clause. Indeed, the Third Circuit's approach would have supported upholding the forfeiture against Bajakajian himself, since his $357,144 forfeiture was "only" 1.43 times greater than the $250,000 statutory maximum.

As a forfeiture-law treatise has put it, courts that look to the statutory maximum rather than Guidelines "ignore[] the central point of *Bajakajian*." Smith, *supra*, P 12.11 n.25.15. *Bajakajian* mandated a careful, case-specific analysis with an "individualized, desert-oriented version of proportionality review [that] is consistent with the traditional understanding of the meaning of

proportionality." Johnson, *supra*, at 498. It did not authorize courts "to brush off excessiveness claims by comparing the amount of the forfeiture with the maximum fine authorized by the criminal statute." Smith, *supra*, P 12.11 n.25.15. To do so "makes the analysis quite simple but plainly wrong." *Id.*

Therefore, if the courts are to provide any meaningful limitation on forfeitures – as *Bajakajian* and the Eighth Amendment promise – this Court must reject the Third Circuit's approach.

B. The decision below erred in concluding that Mr. Cheeseman's forfeiture does not violate the Excessive Fines Clause.

The decision below erred in concluding that Mr. Cheeseman's forfeiture does not violate the Excessive Fines Clause. The Guidelines fine range demonstrates that a $500,000 forfeiture is grossly disproportional to his offense, as do the other *Bajakajian* factors.

1. Mr. Cheeseman's Guidelines fine range shows that the gravity of his offense was low and a $500,000 forfeiture is grossly disproportional.

Mr. Cheeseman's Guidelines fine range of $7,500 to $75,000 demonstrates that a $500,000 forfeiture is grossly disproportional to the gravity of his offense and violates the Excessive Fines Clause.

Mr. Cheeseman's forfeiture is grossly disproportional to any fine within his Guidelines range. It is nearly seventy times greater than the low end and nearly seven times greater than the high end. The Third Circuit treated the difference between a $75,000 fine and an amount seven times greater as though it were insignificant; in reality, it

is severe. For many people, as for Mr. Cheeseman, the difference between a $75,000 penalty and a $500,000 penalty is the difference between a major financial hardship and complete, likely permanent, financial ruin.[2]

It is far from obvious that even $75,000 would be an appropriate amount to consider in this case because Mr. Cheeseman's culpability is uncommonly low even for someone in his Guidelines range. This is evident in the district court's decision to impose no fine and no prison sentence beyond the time he had already served. App. 10a.

As for the statutory maximum, it only confirms the gross disproportionality of Mr. Cheeseman's forfeiture. Congress has decided that $250,000 is the highest fine that *anyone* should receive for a federal firearms offense. *See* 18 U.S.C. §§ 922, 924,

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[2] The historical background of the Excessive Fines Clause shows that it is especially concerned with fines that would destroy a person's business or livelihood. As the Third Circuit noted in briefly reviewing this background (which it then disregarded in its analysis), Blackstone stated that the law requires that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to . . . the trader his merchandize." App. 24a (quoting 4 William Blackstone, *Commentaries on the Laws of England* 372 (1769)). The Magna Charta likewise provided that an "amercement" against a merchant should be proportionate to his crime and "sav[e] to him his merchandise." *Bajakajian*, 524 U.S. at 335-36 (quoting Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)). The First Circuit has accordingly held that an Excessive Fines Clause analysis should "consider whether forfeiture would deprive the defendant of his or her livelihood." *United States v. Levesque*, 546 F.3d 78, 83 (1st Cir. 2008).

3571(b)(3). That means, for example, that Congress found a fine greater than $250,000 to be inappropriate in any case – regardless of how egregious – in which an offender sells handguns to juveniles, deals in stolen firearms, or steals firearms from a gun dealer. *See* 18 U.S.C. § 922(i), (j), (u), (x)(1).

The Guidelines provide a sense of just how much worse Mr. Cheeseman's conduct would have needed to be to have warranted the statutory maximum. Under the Guidelines, even if the firearms had been stolen property and Mr. Cheeseman had used them to commit another felony, his fine range still would have been just $12,500 to $125,000. *See* U.S. Sentencing Guidelines Manual §§ 5E1.2(3), 2K2.1. Mr. Cheeseman might have qualified for the highest range of $25,000 to $250,000 if, instead of his sporting-goods store's otherwise-lawful firearms inventory, he had possessed the same number of grenades, rockets, and missiles – and they had been stolen. *See id.* §§ 5E1.2(c)(3) (requiring offense level of 38 for highest fine range), 2K2.1 (providing a base offense level of 26 for an offense involving destructive devices, a ten-level increase for a quantity exceeding 200, and a two-level increase for stolen weapons).

Thus, the statutory maximum penalty for a violation of § 922(g)(3) has no relationship to the gravity of Mr. Cheeseman's offense. The value of his forfeiture is double the amount that the very worst federal firearms offenders can be fined, which demonstrates that it is grossly disproportional.

2. The Third Circuit erred in analyzing the other *Bajakajian* factors, which also show that the gravity of Mr. Cheeseman's offense was low.

The Third Circuit also exhibited confusion in its application of the other *Bajakajian* factors, which also show that the gravity of Mr. Cheeseman's offense was low.[3]

First, the Third Circuit erred when it distinguished this case from *Bajakajian* on the ground that "the illegal possession of firearms was not the only illegality associated with Cheeseman's crime." App. 28a. "Rather," the court said, "in addition to unlawfully possessing firearms, Cheeseman was also abusing illegal narcotics." *Id.* This makes little sense. Mr. Cheeseman's possession of firearms would not have been illegal at all if he had not used drugs. Therefore, his drug use was not "additional" illegal conduct – it was the *only* illegal conduct.

Second, contrary to the Third Circuit's conclusion, Mr. Cheeseman is not among the class of offenders "for whom the statute was principally designed." *Bajakajian*, 524 U.S. at 338. Although his behavior certainly violated the statute, Mr.

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[3] Mr. Cheeseman's first Question Presented addresses only the weight courts should give the Guidelines in a gross-disproportionality analysis and is the primary reason for this Court to hear the case. Should the Court grant certiorari, Mr. Cheeseman asks that it also address the rest of the Third Circuit's gross-disproportionality analysis, which reflected a similar disregard for the specific details of Mr. Cheeseman's offense.

Cheeseman was unlike other offenders because he did not possess his firearms in the manner that the statute primarily contemplates. Instead, the vast majority of the firearms were part of the inventory of a sporting-goods store, which he owned as a sole proprietor but no longer operated, and the others were collector's items.[4] On the dates of the conduct to which he pled guilty, he had long since given power of attorney and control over the store to his sister. There is no record evidence that he ever personally loaded, fired, or otherwise used the firearms in the seized store inventory.

The decision below stated that the statute reflects the view that drug users "should not have access to, nor possess, firearms because of safety concerns." App. 28a. But the statute does not criminalize or otherwise address "access." If Mr. Cheeseman's sister had owned the store from the outset, but he had the same access to the guns, presumably he would not have been charged under § 922(g)(3) and the firearms would not have been seized. He only suffered his enormous forfeiture because he did not transfer ownership of the store instead of just transferring control. Of course that does not make his conduct any less illegal, but it does

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[4] If Mr. Cheeseman had possessed the firearms for "solely for lawful sporting purposes or collection," the Guidelines would have prescribed a base offense level of 6, which would correspond to a Guidelines fine range of $500 to $5,000. U.S. Sentencing Guidelines Manual §§ 5E1.2(3), 2K2.1(b)(2). Although most of the firearms here do not fall within the letter of this provision, the nature of Mr. Cheeseman's possession is similar and involves the same relatively low culpability.

make his offense one of unusually low culpability, like the offense in *Bajakajian*.

Finally, the Third Circuit erred when it failed to consider the relative lack of harm resulting from Mr. Cheeseman's conduct. *See Bajakajian*, 524 U.S. at 339.

This factor weighed in Mr. Cheeseman's favor because his violation caused relatively little harm. The Third Circuit stated that Mr. Cheeseman had "unfettered access to an arsenal of weapons and ammunition" and "facilitated" other addicts' "access to that arsenal," but there is no evidence that he or either of his female companions ever actually used firearms. To be sure, the government takes seriously the harm inherent in such a potentially dangerous situation and the harm caused by drug use. Nonetheless, in this case, this harm was relatively small compared to the harm that could result from actual firearm misuse; indeed, the record shows that Mr. Cheeseman successfully pursued rehabilitation after his arrest.

Mr. Cheeseman's forfeiture is so large only because his store had a large inventory, not because he caused greater harm than other offenders. An offender who possessed just one gun but actually used it could cause far more harm but would suffer only a minimal forfeiture. This demonstrates that the size of Mr. Cheeseman's forfeiture bears no relationship to the harm that he caused. *See Bajakajian*, 524 U.S. at 339 ("It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs.").

These factors verify that Mr. Cheeseman is not a defendant whose crime warrants anything close to a $500,000 penalty. They also verify that the lower court misunderstood the individualized gross-disproportionality analysis that the Excessive Fines Clause requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1756

UNITED STATES OF AMERICA
v.
JAMES L. CHEESEMAN,
Appellant

On Appeal from the District Court
for the District of Delaware
(No. 09-cr-00124-001)
District Judge: Honorable Sue L. Robinson

Argued October 27, 2009

Before: SLOVITER, FUENTES, and HARDIMAN,
Circuit Judges

(Opinion Filed: March 2, 2010)

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OPINION OF THE COURT

FUENTES, Circuit Judge:

Appellant, James L. Cheeseman, pled guilty to violating 18 U.S.C. § 922(g)(3), which criminalizes possession of firearms and ammunition by an unlawful user or addict of a controlled substance. He appeals from the District Court's judgment directing the forfeiture of over 600 firearms and ammunition enumerated in Count I of the indictment to which he pled guilty. Cheeseman raises two arguments on appeal. He first contends that forfeiture pursuant to 18 U.S.C. § 924(d)(1) was improper because the property was neither "involved in" nor "used in" a knowing violation of 18 U.S.C. § 922(g)(3). Alternatively, Cheeseman argues that forfeiture of his property violates the Excessive Fines Clause of the Eighth Amendment. Because we find that the firearms and ammunition specifically identified in Count I of the indictment were involved in Appellant's § 922(g)(3) violation, and because we conclude that the forfeiture of Cheeseman's property was not grossly disproportionate to the gravity of the § 922(g)(3) offense, we will affirm the District Court's Order of Forfeiture.

I. Background[1]

From 1994 through August 2007, Cheeseman was the owner and sole proprietor of X-Ring Supply, a sporting goods and firearms store located in Newark, Delaware. The federal firearms license ("FFL") for X-Ring was held in Cheeseman's name. X-Ring maintained an inventory of approximately 600 firearms. The premises included a separate warehouse located next to the store. Cheeseman's drug abuse began in 2003 after his wife ended their marriage. Between 2005 and 2007, as his crack cocaine addiction worsened, Cheeseman converted X-Ring's warehouse into his home, storing inside it an air mattress, sleeping bag and bedding. The District Court found that fellow crack cocaine abusers occasionally stayed with Cheeseman in the warehouse and that he occasionally turned off X-Ring's security system. Although Cheeseman argues to the contrary, the District Court found that ammunition and gun boxes were stored in the warehouse. In 2005, Cheeseman completed a renewal application for his FFL, on which he indicated that he did not unlawfully use narcotics. Answering this question falsely subjects an applicant

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[1] These facts are derived from the indictment and the District Court's opinion. *See United States v. Cheeseman*, 593 F. Supp. 2d 682 (D. Del. 2009). Although Cheeseman's recitation of the facts surrounding his access and use of X-Ring differs slightly from the District Court's findings of fact, he does not allege that those findings are clearly erroneous, nor does he point to any factual error. He merely presents the facts in a light more favorable to his legal arguments. After reviewing the record, including the portions cited by Cheeseman in support of his factual assertions, we discern no clear error in the District Court's findings of fact.

to 18 U.S.C. § 924(d) penalties. Because of Cheeseman's erratic behavior due to his severe drug habit, his sister Nancy Macknatt assumed power of attorney over her brother and began to manage X-Ring's daily operations. Accordingly, Cheeseman's presence in the store was "sporadic and unpredictable." *Cheeseman*, 593 F. Supp. 2d at 685. Nonetheless, employees found crack pipes on X-Ring's premises on at least three separate occasions.

A.

The incident prompting this case occurred on August 5, 2007, when Delaware police officers observed a woman urinating in the parking lot of a pharmacy. The woman was Cheeseman's companion. After the police officers found drugs on her person, Cheeseman consented to a pat down, during which officers located a crack pipe and crack cocaine. A subsequent search of his vehicle revealed a second crack pipe and additional crack cocaine. Cheeseman told the police officers that he abused drugs and had recently returned from a rehabilitation facility.

Shortly thereafter, federal agents executed a search warrant at X-Ring and seized approximately 609 guns and ammunition; an estimated sixty-seven of the firearms were identified as comprising Cheeseman's personal collection. Some of the seized weapons were antique firearms. In the warehouse, agents recovered a crack pipe, a mirror with cocaine residue, a burnt spoon with cutting residue, an ashtray with white residue, ammunition, a butane torch and a scale with white residue. Consequently, a federal grand jury returned a three-count indictment against Cheeseman with notice of forfeiture, accusing him of: (1) possession of a firearm by an

unlawful drug user in violation of 18 U.S.C. § 922(g)(3); (2) possession of more than five grams of crack cocaine in violation of 21 U.S.C. § 844(a); and (3) distribution of crack cocaine in violation of 21 U.S.C. § 841(a)(1).

Relevant to this appeal, § 922(g)(3) makes it unlawful for any person "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act . . .) . . . to . . . possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(3). Count One of the indictment identified individually the 609 firearms and a quantity of ammunition that Cheeseman was accused of illegally possessing. In December 2007, Cheeseman divested himself of all of his interest in X-Ring, selling it to Macknatt and to his other sister, Pamela Rhoades.[2]

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[2] Now a convicted felon, Cheeseman cannot lawfully possess a firearm. *See* 18 U.S.C. § 922(g)(1). If we were to rule that the forfeiture was improper or unconstitutional, it is less than certain that the firearms and ammunition would be returned to Cheeseman's sisters, the owners of X-Ring. *Cf. United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000) (ruling that convicted felons cannot constructively possess firearms).

B.

In February 2008, Cheeseman pled guilty to violating § 922(g)(3). In his plea agreement he admitted that:

> [I]f there were a trial, the Government would have to prove three elements of the offense: (1) that from on or about August 5, 2007, through August 14, 2007, the defendant possessed a firearm or ammunition; (2) that the defendant was a regular user of, or addicted to, a controlled substance during a period of time proximate to or contemporaneous with the possession of the firearm or ammunition; and (3) the above-described firearm affected interstate commerce. The defendant knowingly, voluntarily, and intelligently admits for purposes of his guilty plea and sentencing that, from on or about August 5, 2007, through August 14, 2007: (a) he actually and constructively possessed the firearms and ammunition set forth in [Count One] of the indictment; (b) he was a regular unlawful user of, and addicted to, cocaine base; and (c) the firearms and ammunition at issue affected interstate commerce.

Cheeseman, 593 F. Supp. 2d at 683 (internal quotation marks & citation omitted). The District Court delayed sentencing in order to hold a forfeiture hearing to determine whether the firearms and ammunition specifically enumerated in Count One of the indictment were forfeitable pursuant to § 924(d)(1), and if so, whether forfeiture would violate the Excessive Fines Clause of the Eighth Amendment.

Section 924 is the penalty provision of the Gun Control Act of 1968 ("Gun Control Act"). Section 924(d)(1) provides that "any firearm or ammunition involved in or used in any knowing violation of subsection . . . (g) . . . of section 922 . . . shall be subject to seizure and forfeiture." Section 924(d)(2)(c) mandates that "[o]nly those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter . . . shall be subject to seizure, forfeiture, and disposition." Pursuant to 26 U.S.C. § 5872(b), any firearms or ammunition forfeited may be destroyed, sold to a state, or used by the federal government.

C.

Although the District Court did not clearly identify which portion of § 924(d) it found satisfied, i.e., whether Cheeseman "involved" or "used" the firearms in a knowing violation of § 922(g)(3), the District Court, after holding a hearing on the forfeitability of Cheeseman's property, concluded that Cheeseman's guilty plea sufficiently satisfied the statute's forfeiture requirements. The District Court first noted that the Government must prove forfeitability by a preponderance of the evidence and establish a sufficient nexus between the § 922(g)(3) violation and the property sought to be forfeited. *See* Fed. R. Crim. P. 32.2(b)(1)(A) (providing that when "the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense"). Next, the District Court rejected Cheeseman's contention that "there [was] no evidence that he ever used or involved a firearm in

any manner to facilitate his cocaine addiction." *Cheeseman*, 593 F. Supp. 2d at 687.

Rather, the District Court made the following findings of fact linking Cheeseman's drug abuse to his § 922(3)(g)(3) violation:

> [I]t is clear from the evidence and testimony presented at the evidentiary hearing as well as the uncontested [Pre-Sentencing Report] that: (1) defendant has been using cocaine since 2003; (2) he was living and using crack cocaine at X-Ring; (3) during after[-]business hours, defendant allowed users of crack cocaine to stay with him at X-Ring; (4) drug paraphernalia was found at X-Ring; (5) defendant lied about his addiction on his FFL renewal; (6) after defendant's FFL was renewed-on false pretenses-he continued to operate X-Ring, including purchasing and selling firearms; (7) he compromised the security of X-Ring by turning off the security alarm in order to allow himself and crack addicts into the retail store; (8) he stored his personal gun collection unsecured; and (9) although not actively involved in the day-to-day business of X-Ring, defendant used drugs on the premises and had unfettered access to the inventory of firearms and ammunition.[3]

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[3] Cheeseman offers "innocent" explanations for his behavior. For example, he contends that he would occasionally turn off X-Ring's security cameras for privacy reasons when he had female companionship at the store. (*See* Appellant's Br. 17.) He does not, however, explain why the District Court's finding constitutes clear error.

Id. Thus, the District Court ruled that the firearms and ammunition specifically identified in Count One of the indictment were forfeitable pursuant to § 924(d)(1).

Next, the District Court rejected Cheeseman's contention that forfeiture of the firearms and ammunition would violate the Eighth Amendment's prohibition on excessive fines. While Cheeseman contended that the seized firearms were worth approximately $500,000 and the Government countered that they were valued at $371,500, the District Court assumed, arguendo, that the actual value was the higher figure. Reasoning that the Government could have charged each individual possession as a separate offense, thereby exposing Cheeseman to multiple special assessments and statutory fines, the District Court concluded that the Government's restraint in charging rendered the forfeiture constitutional. Cheeseman was then sentenced to eight months time-served and three years of supervised release. The District Court declined to impose a fine.

II. Discussion

Cheeseman raises two arguments on appeal. First, he contends that forfeiture of his firearms and ammunition pursuant to §924(d)(1) was improper because the property was neither involved in nor used in a knowing violation of § 922(g). Cheeseman alternatively avers that the forfeiture violates the

Eighth Amendment's prohibition on excessive fines.[4] We do not find either argument persuasive.

A. Statutory Arguments

Cheeseman first argues that forfeiture pursuant to 18 U.S.C. § 924(d) was improper because the contraband was not "involved in" or "used in" a knowing violation of the substantive provision of the Gun Control Act to which he pled guilty. We will first address the second of the two alternatives in the statute, which permits forfeiture of firearms and ammunition "used in" a § 922(g)(3) violation.

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[4] The District Court had subject matter jurisdiction over this criminal case pursuant to 28 U.S.C. § 1331. We exercise jurisdiction over this appeal from the final judgment of conviction pursuant to 28 U.S.C. § 1291. Even though Cheeseman no longer owns the firearms or ammunition, Federal Rule of Criminal Procedure 32.2(4)(A), which governs criminal forfeiture, provides that a forfeiture becomes final at sentencing and that a defendant may appeal a forfeiture order once sentenced. *See United States v. Bennett*, 423 F.3d 271, 275 (3d Cir. 2005) (holding that a final order of forfeiture can only be imposed as part of a defendant's criminal sentence); *United States v. Pelullo*, 178 F.3d 196, 202 (3d Cir. 1999) (noting that "the order of forfeiture entered at sentencing is a final order with respect to the defendant from which he can appeal").

We review a district court's factual findings for clear error and exercise plenary review over a district court's interpretation of a statute. *See United States v. Rivera Constr. Co.*, 863 F.2d 293, 295 n.3 (3d Cir. 1988). We review de novo a district court's determination of whether a forfeiture constitutes an excessive fine in violation of the Constitution's Eighth Amendment. *See United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998).

The first step in interpreting the meaning of § 924(d)(1) is analyzing the statutory text. *See Bailey v. United States*, 516 U.S. 137, 144-45 (1995). Because neither "involved in" nor "used in" is defined in the statute, we look to the ordinary and natural meaning of the words, as well as the "placement and purpose [of the phrases] in the statutory scheme." *Id.* at 145 (internal quotation marks & citation omitted). Thus, the "meaning of statutory language, plain or not, depends on context." *Id.* at 144-45 (instructing interpreting courts to review the "language, context, and history" of a statute). In turn, it is appropriate to examine similar language in the statute to ascertain the meaning of undefined terms. *See id.* (noting that "using a firearm should not have a different meaning in § 924(c)(1) than it does in § 924(d)") (internal quotation marks & citation omitted).

If a statute is ambiguous and punitive in nature, "the rule of lenity requires that any ambiguity in the statute be resolved in favor of the claimant." *United States v. $734,578.82 in United States Currency*, 286 F.3d 641, 657 (3d Cir. 2002) (citing *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 801 (3d Cir. 1994)). The rule of lenity, however, is inapplicable if there is only a mere suggestion of ambiguity because most "statutes are ambiguous to some degree." *See id.* at 658 (internal quotation marks & citation omitted). Furthermore, any "[j]udicial perception" that the result in a case is unreasonable may not enter into our interpretation of an unambiguous statute. *See Comm'r v. Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987).

1. "Used In" Prong of 18 U.S.C. § 922(g)(3)

Cheeseman argues that forfeiture pursuant to 18 U.S.C. § 924(d)(1) was improper because the seized

firearms and ammunition were not "used in" his § 922(g)(3) violation. Although no precedential case law directly addresses the meaning of "used in" with respect to a § 922(g)(3) violation, in a trilogy of cases the Supreme Court has extensively explored the meaning of "uses" in the § 924(c) context. Section 924(c) adds five years to a sentence for anyone who uses, carries, or possesses a firearm during and in relation to a crime of violence or a drug trafficking crime. Because the meaning of "use" is presumed to be the same in §§ 924(c) and 924(d)(1), these cases guide our interpretation of the meaning of the phrase "used in any knowing violation of subsection . . . (g) . . . of section 922" in § 924(d)(1). *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

The first case in which the Supreme Court addressed the definition of "uses" in the context of § 924(c) was *Smith v. United States*, 508 U.S. 223 (1993). In *Smith*, the Court ruled that trading a firearm for drugs constituted a "use" for purposes of applying § 924(c)'s enhanced penalty. 508 U.S. at 225. The Court looked at the dictionary definition of "use," noting that it is defined, variably, as "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." *Id.* at 229 (internal quotation marks & citation omitted). Thus, according to the plain language of the term, the *Smith* Court ruled that "use" of a firearm is not limited to firing a firearm. *Id.* To the contrary, the Court held that Smith used the firearm when he traded it for drugs. *See id.* at 240-41.

Two years later in *Bailey v. United States*, 516 U.S. 137 (1995), the Court addressed whether mere possession of a firearm constituted a "use" of a firearm during and in relation to drug trafficking.[5] Ruling in the negative, the Court concluded that "evidence of the proximity and accessibility of a firearm to drugs or drug proceeds is alone [in]sufficient to support a conviction for 'use' of a firearm during and in relation to a drug trafficking offense." *Bailey*, 516 U.S. at 138-39. Invoking the canon of statutory interpretation that "a legislature is presumed to have used no superfluous words," the Court reasoned that the expansive reading of "use" urged by the government would also encompass carrying a firearm, thereby rendering the term "carry" superfluous. *Id.* at 145-46. Because the Court discerned no intention by Congress for these terms to be redundant, it rejected the government's expansive reading of "use." Thus, according to *Bailey*, "use" requires more than mere possession of a firearm; rather, "use" entails active employment or utilization of a firearm to bring it within the meaning of § 924(c). *See id.* at 143.

Finally, in *United States v. Watson*, the Court ruled that trading drugs for a firearm did not constitute a use within the meaning of § 924(c). 552 U.S. 74, 76 (2007). Building upon *Smith* and *Bailey*,

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[5] At the time *Bailey* was decided, § 924(c) did not include the term "possess." It only included the terms "carry" and "use." After the Court ruled that mere possession did not constitute a "use" for § 924(c) purposes, Congress amended the statute to criminalize possession of a firearm during and in relation to a drug trafficking offense.

the *Watson* Court noted that in a bartering situation, a "seller does not 'use' a buyer's consideration." 552 U.S. at 79 (citation omitted). Thus, receipt of a gun in trade for drugs does not constitute a "use" of a firearm for § 924(c) purposes.

Citing this trilogy of cases, Cheeseman contends that forfeiture was inappropriate because the seized firearms and ammunition were not "used in" a knowing violation of § 922(g)(3). The Government counters that Cheeseman employed the firearms by "purchasing them, offering them for sale [through X-Ring], and using the proceeds to support his crack cocaine addiction." (Appellee's Br. 23.) According to the Government, like the defendant in *Smith*, Cheeseman bartered with his firearms to purchase drugs. To adopt this argument, we must accept that (1) illegally purchasing guns on behalf of X-Ring (2) in order to sell those guns to lawful buyers (3) for the purpose of using the proceeds from the sales to purchase drugs, is similar to the facts of *Smith*, in which the defendant gave his gun directly to a drug dealer for cocaine. This reasoning stretches *Smith* too far and therefore must be rejected. There is no evidence in the record suggesting that Cheeseman actively employed the firearms or traded his firearms to drug dealers to purchase crack cocaine. Rather, the record supports a finding that Cheeseman unlawfully possessed the firearms while addicted to narcotics. Indeed, unlawful possession due to his status as a drug abuser was the basis for Cheeseman's guilty plea. Because *Bailey* dictates that mere possession does not constitute "use" for § 924(d)(1) purposes, forfeiture cannot be based upon this portion of the statute.

2. "Involved In" Prong of 18 U.S.C. § 922(g)(3)

Cheeseman's next argument, that the District Court's order should be reversed because the seized firearms and ammunition were not "involved in" a violation of the Gun Control Act, is less persuasive. Like "used in," "involved in" is not defined in § 924(d)(1). Therefore, our analysis again begins with the plain meaning of "involved." Merriam-Webster defines "involved" as: (1) "to engage as a participant"; (2) "to relate closely"; (3) "to have within or as part of itself"; and (4) "to require as a necessary accompaniment." Merriam-Webster's Collegiate Dictionary 660 (11th ed. 2003). The term's plain meaning leads to the conclusion that the seized firearms specifically identified and enumerated in Count I were "involved in" the offense to which Cheeseman pled guilty because the firearms served as the foundation of his criminality and conviction. Indeed, without the firearms, there would have been no crime. Accordingly, the firearms were related closely to and were a necessary accompaniment to the crime charged in Count One.

Nonetheless, Cheeseman contends that the firearms were not "related at all to," nor "involved in," his addiction. (*See* Appellant's Br. 25.) This argument exposes Cheeseman's misunderstanding of § 924(d)(1). The forfeiture statute does not require that the firearms be "involved in" Cheeseman's addiction in order to be subject to forfeiture. To the contrary, § 924(d)(1) permits forfeiture of all firearms that are involved in the § 922(g)(3) offense. In other words, the object of "involved in" is not Cheeseman's addiction. Rather, "involved in" addresses the offenses enumerated in § 924(d)(1), including the § 922(g)(3) violation to which Cheeseman pled guilty.

Furthermore, as the Government notes, possession of firearms is a necessary element of a § 922(g)(3) offense. *See United States v. 13 Firearms & Ammunition Seized from 7438 KY 718 Dewitt, Ky., No. 06-cv-51*, 2006 WL 1913360, at *2 (E.D. Ky. July 11, 2006) (noting that "involved in . . . includes firearms possessed by prohibited persons"); *see also United States v. Jones*, 232 F. Supp. 2d 618, 623 n.8 (E.D. Va. 2002) (reasoning that in § 922(g)(3) the firearm is the *corpus delicti*)[6]; *cf. United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) (noting that the laundered money is the corpus of a money laundering violation and is therefore "involved in" the offense).

Indeed, all § 922(g)(3) requires for a violation is mere possession of firearms by an unlawful drug abuser, and Cheeseman admitted unlawful possession in his guilty plea. Cheeseman's argument that the very firearms that serve as the basis for his underlying conviction are not "involved in" or "related to" that conviction strains credulity.

Nor is the phrase "involved in" ambiguous, which would otherwise merit application of the rule of lenity, because when read in the context of the entire statute, interpreting "involved in" to include possession of firearms does not render § 924(d)(1)'s "used in" clause redundant. *See Bailey*, 516 U.S. at 146 ("We assume that Congress used two terms ['carry' and 'use'] because it intended each term to have a particular, nonsuperfluous meaning."). When read in the context of the entire statute and in

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[6] *Corpus delicti* means "the substance of the crime." Black's Law Dictionary 369 (8th ed. 2004).

conjunction with the Gun Control Act's legislative history, it is clear that both terms "used in" and "involved in" have particular meanings.

A central goal of the Gun Control Act was restricting public access to firearms. It was enacted to "strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 90-1577, at 6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4411. Congressional action was prompted by the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." *Id.* at 7. Additionally, the Gun Control Act amended Title IV of the Omnibus Crime Control and Safe Street Acts of 1968 to include unlawful users of narcotics in the class of individuals whose access to, and possession of, firearms Congress deemed contrary to public interest. *Id.*; *see also Huddleston v. United States*, 415 U.S. 814, 824 (1974). This purpose is illustrated by Congressman Celler's floor statement, entered into the Congressional Record during the Act's debate, wherein he noted that:

> [W]e are convinced that a strengthened [firearms control system] can significantly contribute to reduc[ing] the danger of crime in the United States. No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons.

Huddleston, 415 U.S. at 828 (internal quotation marks & citation omitted). Therefore, § 922(g) was enacted to keep firearms "out of the hands of those not legally entitled to possess them" due to their status of falling into one of § 922(g)'s prohibited categories. *Id.* at 824 (internal quotation marks & citation omitted).[7] In other words, § 922(g) "simply strikes at the possession of firearms by the wrong kind of people." *Scarborough v. United States*, 431 U.S. 563, 573 (1977) (internal quotation marks & citation omitted). The regulation interpreting this section of the Gun Control Act defines an unlawful user of a controlled substance as someone who "uses a controlled substance and has lost the power of self-control." 27 C.F.R. § 478.11. Cheeseman's guilty plea makes plain that he is just such a person.

In 1986, Congress passed the Firearms Owners Protection Act ("FOPA"), which amended the Gun Control Act. FOPA was designed to relieve the "burdens" the 1968 Act imposed on lawful firearms users while simultaneously strengthening "the ability of law enforcement to fight violent crime and narcotics trafficking." H.R. Rep. No. 99-495, at 1 (1986), *printed in* 1986 U.S.C.C.A.N. 1327, 1327. FOPA also limited the forfeiture provision of the Gun

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[7] Significantly, under the Senate version of the bill, an amendment removed the prohibition on drug abusers from owning, possessing or receiving firearms or ammunition. H.R. Rep. No. 90-1577, at 30, *reprinted in* 1968 U.S.C.C.A.N. 4410, 4430. The House version of the bill, however, preserved the broad exclusion and was ultimately adopted by the Conference Committee, passed by both Chambers of Congress and signed into law. *Id.* Thus, despite a challenge from the Senate, the proscription against unlawful drug users possessing firearms remained intact.

Control Act to firearms or ammunition "particularly named and individually identified as involved in or used in specified violations of law." *Id.* at 13 (internal quotation marks & citation omitted). FOPA did not define the term "involved in" in either the definitions portion of the bill or in the accompanying report language. Nor did FOPA remove the prohibition on drug abusers owning, possessing or receiving firearms or ammunition.

This legislative history supports our conclusion that our interpretation of "involved in" does not render the "used in" clause superfluous. In *Smith*, the Supreme Court opined that Congress varied the statutory language in § 924(d)(1) and included the broad term "involved in" to apply to crimes in which the firearm's involvement in the enumerated offense would not require a use of the firearm. 508 U.S. at 235 (Congress "carefully varied the statutory language [in § 924(d)(1)] in accordance with the guns' relation to the offense."). Consequently, the term "involved in" necessarily has a more expansive meaning than the term "use" in order to effectuate Congress' intention that forfeiture apply to the unique crimes enumerated in § 922, which may be committed without ever using a firearm. *Id.* In this way, Congress ensured that the class of individuals it deemed should not possess weapons would have their firearms forfeited upon a violation of § 922. As an example, the *Smith* Court noted that § 922(a)(6) criminalizes "making of a false statement material to the lawfulness of a gun's transfer." *Id.* "Because making a material misstatement in order to acquire . . . a gun is not 'use' of the gun even under the broadest definition of the word 'use,'" the Supreme Court concluded that "Congress carefully expanded the statutory language" by including the

term "involved in" in the statute. *Id.* Therefore, Congress chose such a broad term to ensure forfeiture of firearms for offenses where, as in Cheeseman's case, "use" is not a necessary – or sometimes even a possible – element of the crime. Thus, when read in context of the entire statute and with Congress' intent in mind, the terms "involved in" and "used in" retain separate meanings.

In sum, we hold that possession of firearms and ammunition is sufficient for a district court to find that the property was "involved in" a § 922(g)(3) offense. This interpretation of "involved in" makes sense in light of Congress' intent to keep firearms out of the possession of drug abusers, a dangerous class of individuals, and supports a finding that the seized firearms and ammunition were "involved in" Cheeseman's § 922(g)(3) offense. This conclusion is bolstered by the District Court's findings that: (1) Cheeseman had unfettered access to the full panoply of weapons located in X-Ring; (2) he used crack cocaine in and around those weapons; and (3) he brought other drug abusers to the store and warehouse to smoke crack. Accordingly, we affirm the District Court's determination that the specified firearms and ammunition were "involved in" Cheeseman's § 922(g)(3) violation.[8]

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[8] For the same reasons that the forfeited firearms and ammunition were "involved in" a knowing violation of § 922(g)(3), the District Court correctly found, pursuant to Federal Rule of Criminal Procedure 32.2, that a sufficient nexus existed between the forfeited property and the offense.

3. "Knowing" Violation of 18 U.S.C. § 922(g)(3)

Cheeseman's final statutory argument, that he did not knowingly violate § 922(g)(3), also fails. Cheeseman contends that while he pled guilty to violating § 922(g)(3), his guilty plea "does not provide an admission of 'knowingly' violating Section 922(g) for purposes of forfeiture." (Appellant's Br. 26.) Cheeseman argues, without citation to any supporting case law, that knowledge is especially important in cases, such as his, where the forfeiture is a criminal punishment. (*Id.* at 27.)

This argument is unpersuasive because it discounts firmly established case law construing the term "knowing" to require "only that the act be voluntary and intentional and not [to require] that a person knows he is breaking the law." *United States v. Sokolow*, 91 F.3d 396, 408 (3d Cir. 1996) (internal quotation marks & citation omitted). Cheeseman does not contend that his drug use or firearm possession was involuntary or unintentional.

In essence, Cheeseman invites the Court to read into § 924(d)(1) a willfulness requirement, which, if applied, would require him to have had actual knowledge that his prohibited conduct was illegal in order for the firearms to be forfeitable. (Appellant's Br. at 26-27). We reject this argument. "Congress [is] presumed to know the meanings of the words and phrases it uses in drafting statutes." *Pope by Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1249 (3d Cir. 1993). Here, Congress used the term "knowing" and not "willful," clearly indicating its preference for the lower scienter. Further undermining Cheeseman's argument is the fact that Congress included a willful mens rea in another clause of 924(d)(1). Therefore, if Congress intended the first

clause of § 924(d)(1) to also contain a heightened scienter, it would have used the term willful instead of knowing.

Second, despite his protestations to the contrary, in his plea agreement Cheeseman unambiguously admitted that he was an unlawful user of narcotics who knowingly possessed firearms and ammunition. Prior to enactment of FOPA, courts often considered § 922(g) strict liability crimes. *See, e.g., United States v. Capps*, 77 F.3d 350, 352 n.2 (10th Cir. 1996). After FOPA became law, however, courts read into § 922(g) a mens rea requirement. *Id.* While the statute is silent as to its requisite mens rea, the elements of a 18 U.S.C. § 922(g)(3) violation are: (1) that the defendant is an unlawful user or addicted to any controlled substance; (2) who thereafter knowingly possessed a firearm; and (3) the possession was in or affecting interstate commerce. *Cf. United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000) (reading into the felon-in-possession portion of § 922(g)(1) a "knowing" scienter); *Capps*, 77 F.3d at 352 (same). Therefore, because Cheeseman pled guilty to Count One, he admitted that he knowingly violated § 922(g)(3). Third, to the extent that Cheeseman's argument is based on his contention that he had not been adjudicated an unlawful possessor of firearms at the time he committed the § 922(g)(3) offense, and was therefore not on notice that he was knowingly violating the statute, this argument also fails. This is essentially a variant on the losing argument that ignorance of the law excuses illegal conduct. *Cf. United States v. Napier*, 233 F.3d 394, 398 (6th Cir. 2000) ("[A] legally relevant status under § 922(g) may arise in the absence of any formal proceeding. For example, § 922(g)(3) prohibits an individual addicted to controlled substances from possessing a

firearm, yet an individual attains the status of a drug addict without a court proceeding of any kind.").

Accordingly, we conclude that the firearms and ammunition enumerated in Count One of the indictment are subject to forfeiture because they were "involved in" Cheeseman's knowing 18 U.S.C. § 922(g)(3) violation.

B. Excessive Fines Claim

Having concluded that § 924(d)(1) permits forfeiture of Cheeseman's firearms and ammunition, we must determine whether that forfeiture violates the Eighth Amendment's prohibition on excessive fines.

1. History of the Excessive Fines Clause

The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. There was little debate surrounding the adoption of the Eighth Amendment and no discussion regarding the inclusion within the Amendment of the Excessive Fines Clause. *See Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 420 n.9 (3d Cir. 2000). Still, the Excessive Fines Clause traces its roots as far back as the Magna Carta. *See United States v. Premises Known as RR No. 1 Box 224, Dalton, Scott Twp. & North Abington Twp., Lackawanna, Pa.*, 14 F.3d 864, 875 n.12 (3d Cir. 1994) ("Blackstone says that the reasonableness of a fine must be determined by reference to Magna Carta's prohibition on excessive amercements [a common criminal sanction]. Specifically, Blackstone says 'no man shall have a larger amercement imposed upon him, than

his circumstances or personal estate will bear: saving to . . . the trader his merchandize.'") (citing 4 William Blackstone, *Commentaries* *372). Thus, at the time of the Framing, the Founders understood "'fine' . . . to mean a payment to a sovereign as punishment for some offense." *Bajakajian*, 524 U.S. at 327 (internal quotation marks & citation omitted); *see also Austin v. United States*, 509 U.S. 602, 609 (1993) ("The purpose of the Eighth Amendment . . . was to limit the government's power to punish."). In turn, the Excessive Fines Clause restricts "the Government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Bajakajian*, 524 U.S. at 328 (internal quotation marks & citation omitted). The Eighth Amendment is applicable if the forfeiture constitutes a "fine" and is violated only if that fine is "excessive." *See Tillman*, 221 F.3d at 420.

While the Excessive Fines Clause was initially applied only to *in personam* actions, the Supreme Court expanded its applicability to civil *in rem* forfeiture proceedings if the forfeiture constituted, in part, punishment. *See Austin*, 509 U.S. at 610 (noting that sanctions can serve both a remedial and punitive purpose). This holding was narrowed somewhat by the Supreme Court in *Bajakajian*, wherein the Court noted that traditional *in rem* forfeitures were not punitive and would therefore fall outside of the Eighth Amendment's protections. 524 U.S. at 331. The Court further noted, however, that "[b]ecause some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, we have held that a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*." *Id.* at

331 n.6. Thus, while the Court has classified § 924(d)(1) as remedial and therefore a civil sanction, *see United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363-65 (1984), forfeiture pursuant to this section nonetheless is subject to Eighth Amendment scrutiny. Here, the Government and Cheeseman agree that the forfeiture is criminal in nature since it is part of his criminal judgment and sentence. A defendant bears the burden of establishing that a forfeiture constitutes an unconstitutional excessive fine. *See, e.g., United States v. Jose*, 499 F.3d 105, 108 (1st Cir. 2007).

2. *United States v. Bajakajian*: Gross Disproportionality

In *Bajakajian*, the Supreme Court held that the forfeiture of a sum of money grossly disproportionate to the underlying crime constituted an Excessive Fines Clause violation. *Bajakajian* involved the forfeiture of $357,144 for failure to report to the United States government sums over $10,000 transported by an individual leaving the country in violation of 31 U.S.C. § 5316(a)(1)(A). *See Bajakajian*, 524 U.S at 324-25. Bajakajian argued that forfeiture of the entire $357,144 sum involved in the reporting offense ran afoul of the Constitution. *Id.* at 324.

After first determining that the forfeiture was punitive, the *Bajakajian* Court reasoned that the next step in an Excessive Fines Clause analysis was to ascertain whether it was excessive. According to the Court, the "touchstone of the constitutional inquiry . . . is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334. The Court further reasoned that

because "judgments about the appropriate punishment for an offense belong . . . to the legislature" and because "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise[,] . . . [b]oth of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Id.* at 336. In turn, the Court adopted a gross disproportionality standard. *Id.*

To analyze proportionality, the *Bajakajian* Court first examined the nature of the substantive crime, noting that it was solely a reporting offense, unrelated to any other illegal activity, which required a "willful" mens rea for conviction. *Id.* at 337. Next, the Court opined that Bajakajian did "not fit into the class of persons for whom the statute was principally designed," i.e., money launderers, drug dealers, or tax evaders. *Id.* at 338. Third, the Court noted that the six-month maximum sentence and $5,000 maximum fine recommended by the Sentencing Guidelines evidenced a "minimal level of culpability." *Id.* at 338-39. The Court also indicated that it was appropriate to compare the amount the government sought to forfeit with the maximum fine permitted under the statute. *Id.* at 339 n.14. Finally, the Court concluded that the harm Bajakajian caused was minimal since his offense only injured the government in "a relatively minor way." *Id.* at 339; *see also Premises Known as RR No. 1 Box 224*, 14 F.3d at 875 (noting that a reviewing court should evaluate the gravity of the offense, the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, the sentences imposed for commission of the same crime in other jurisdictions and the culpability of the offender).

After considering all these factors, the Supreme Court ruled the $357,144 forfeiture unconstitutional.

3. The Forfeiture was Not Grossly Disproportionate to Cheeseman's Crime

Applying the factors outlined in *Bajakajian*, we conclude that the forfeiture of Cheeseman's firearms and ammunition was not grossly disproportionate to his 18 U.S.C. § 922(g)(3) violation. Here, unlike the reporting offense in *Bajakajian*, the illegal possession of the firearms was not the only illegality associated with Cheeseman's crime. Rather, in addition to unlawfully possessing firearms, Cheeseman was also abusing illegal narcotics.[9]

Next, Cheeseman's protestation that his crime was victimless because he did not possess the firearms as a means to procure drugs is unpersuasive because it demonstrates a misunderstanding of § 922(g)(3)'s purpose. (*See* Appellant's Br. at 32.) Cheeseman is exactly the type of individual for whom the statute was designed. Section 922(g)(3) of the Gun Control Act reflects Congress' view that certain types of individuals, including drug abusers, mental incompetents, and violent felons, should not possess firearms. This is eminently reasonable considering that intoxicated individuals should not have access to, nor possess, firearms because of public safety concerns. Therefore Cheeseman, a crack cocaine addict with unfettered access to an arsenal of weapons and ammunition,

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[9] Though our reasoning differs from that of the District Court, because we review a district court's interpretation of the Constitution de novo, we may affirm the District Court's ruling based upon the alternative reasoning discussed in this section.

who facilitated other crack cocaine addicts' access to that arsenal, squarely fits within the class of persons whose behavior the statute aims to criminalize. Additionally, Cheeseman's contention that he legally owned and operated a firearms dealership for many years is disingenuous at best since he was abusing drugs during his ownership of X-Ring. Cheeseman's misrepresentation on his FFL application further undermines this argument.

Finally, even assuming the firearms and ammunition were worth approximately $500,000, this sum is not grossly disproportionate to the crime to which Cheeseman pled guilty. While Cheeseman correctly notes that $500,000 exceeds the fine range of $7,500 to $75,000 recommended by the Sentencing Guidelines, when weighed against the circumstances surrounding Cheeseman's crime, this factor is not dispositive. In *Bajakajian*, the amount the government sought to forfeit was $357,144, over seventy times the $5,000 maximum fine authorized by his Guideline. *See Bajakajian*, 524 U.S. at 337-38. Here, although $500,000 is roughly seventy times greater than the low end of Cheeseman's Guideline range, it is less than seven times greater than the high end of his Guideline range. In any event, when considered in light of all the factors that *Bajakajian* instructs courts to consider, the fact that the worth of the guns is a larger sum than the Guideline fine does not sufficiently outweigh the remaining factors that militate against a finding of unconstitutionality. Furthermore, as noted in *Bajakajian*, the Guideline fine alone is not dispositive and we may also consider the statutory maximum fine that Cheeseman faced. *See id.* at 339 n.14. Here, the statutory maximum fine was $250,000. Thus, a forfeiture valued at $500,000 is only two times greater than the

maximum fine permitted by the statute. *Cf. United States v. Wallace*, 389 F.3d 483, 486-87 (5th Cir. 2004) (ruling forfeiture of a $30,000 plane willfully operated without a federal registration by an individual with no criminal history would not violate the Eighth Amendment when the statutory maximum fine was $15,000). Thus, any discrepancy between the value of the firearms and the Guideline fine is not controlling and therefore does not serve as the basis for finding an Excessive Fines Clause violation. In sum, we conclude that the forfeiture of Cheeseman's firearms and ammunition was not grossly disproportionate to his 18 U.S.C. § 922(g)(3) offense because he was abusing drugs while illegally possessing firearms, he was part of the class of persons whose behavior the statute criminalized, and the value of the firearms was at most two times the maximum penalty imposed by the statute. In turn, forfeiture of Cheeseman's firearms and ammunition did not violate the Excessive Fines Clause.

III. Conclusion

For the foregoing reasons, we will affirm the District Court's Order of Forfeiture.

HARDIMAN, *Circuit Judge*, concurring.

I join the Majority's thoughtful and comprehensive opinion in every respect save one: because I agree with the Majority that the phrase "involved in" as used in 18 U.S.C. § 924(d)(1) is unambiguous, I do not believe recourse to legislative history is necessary or proper.

When interpreting a statute, it has long been accepted that ourts should only examine legislative history when the statutory text is ambiguous or otherwise unclear. *See Ex Parte Collett*, 337 U.S. 55, 61 (1949). If the text is clear and unambiguous, our inquiry ends. *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 186 (2004); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004). Moreover, we have observed that reliance on legislative history "is to be avoided whenever possible due to the inherent unreliability of using legislative history as a basis for ascertaining legislative intent." *Roe v. Casey*, 623 F.2d 829, 842 (3d Cir. 1980).

Here, after a convincing analysis of the text of § 924(d)(1), the Majority quite rightly concludes that the plain meaning of the phrase "involved in" authorizes the forfeiture of Cheeseman's firearms. Maj. Op. Typescript at 14. In rejecting Cheeseman's request that we apply the rule of lenity, the Majority states: "Nor is the phrase 'involved in' ambiguous." *Id.* at 15. Despite this conclusion, the Majority expounds upon the legislative histories of the Gun Control Act and the Firearm Owners Protection Act to buttress its textual interpretation of § 924(d)(1). *Id.* at 16-18. At least six of the sitting Justices of the Supreme Court have counseled against this approach. *See, e.g.*, *Boyle v. United States*, 129 S. Ct. 2237, 2246 (2009) (Alito, J.) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on . . . legislative history . . . ."); *Zedner v. United States*, 547 U.S. 489, 509-10 (2006) (Scalia, J., concurring in part and concurring in the judgment) ("Here, the Court looks to legislative history even though the remainder of its opinion amply establishes that the

[statute] is unambiguous . . . Use of legislative history in this context . . . conflicts . . . with this Court's repeated statements that when the language of the statute is plain, legislative history is irrelevant."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (Kennedy, J.) ("As the conclusion we reach today is directed by the text of [the statute], we need not assess . . . legislative history . . . ."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (Ginsburg, J.) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (Thomas, J.) ("When the words of a statute are unambiguous, . . . [the] judicial inquiry is complete.") (internal quotation marks omitted); *see also William L. Rudkin Testamentary Trust v. Comm'r*, 467 F.3d 149, 152 (2d Cir. 2006) (Sotomayor, J.) (quoting *Toibb v. Radloff*, 501 U.S. 157, 162 (1991)) ("'[A]lthough a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so' if the statutory language is clear.").

For the foregoing reasons, I do not join that portion of the Court's opinion that delves into legislative history.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES CHEESEMAN,

Defendant.

Crim. No. 07-124-SLR

Keith M. Rosen, Assistant United States Attorney for the District of Delaware, Chief, Criminal Division. Wilmington, Delaware. Counsel for Plaintiff.

Joseph Hurley, Esquire, Wilmington, Delaware. Counsel for Defendant. Charles Oberly, Esquire, Wilmington, Delaware. Counsel for Nancy Macknatt, Pamela Rhoades and X-Ring, Supply, LLC.

MEMORANDUM OPINION

Dated: January 15, 2009

Wilmington, Delaware

ROBINSON , District Judge

I. BACKGROUND

On September 13, 2007, a federal grand jury returned a three count indictment with notice of forfeiture charging defendant James Cheeseman with: possession of a firearm by an unlawful drug user or addict, in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2) (count one);[1] possession of more than five grams of crack cocaine, in violation of 21 U.S.C. § 844(a) (count two); and (3) distribution of crack cocaine, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(C) (count three). (D.I. 13)

Pursuant to a plea agreement, defendant entered a plea of guilty to count one of the indictment on February 21, 2008. (D.I. 27) The plea agreement provided and defendant specifically admitted that,

> if there were a trial, the Government would have to prove three elements of the offense: (1) that from on or about August 5, 2007, through August 14, 2007, the defendant possessed a firearm or ammunition; (2) that the defendant was a regular user of, or addicted to, a controlled substance during a period of time proximate to or contemporaneous with the possession of the firearm or ammunition; and (3) the above-described firearm affected interstate commerce. The defendant

[1] Count one alleged that defendant was a prohibited person by virtue of his status as an unlawful drug addict and identified 609 firearms and a quantity of ammunition that defendant possessed.

> knowingly, voluntarily, and intelligently admits for purposes of his guilty plea and sentencing that, from on or about August 5, 2007, through August 14, 2007: (a) he actually and constructively possessed the firearms and ammunition set forth in [count one] of the indictment; (b) he was a regular unlawful user of, and addicted to, cocaine base; and (c) the firearms and ammunition at issue affected interstate commerce.

(*Id.* at ¶¶ 2, 3)

A sentencing hearing was scheduled for June 4, 2008; however, an unopposed motion to continue the sentencing was granted in order to accommodate the parties' attempts to "negotiate a settlement of the forfeiture claims."[2] (D.I. 35 at ¶4) After settlement attempts failed, a forfeiture hearing was held on

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[2] Pursuant to Fed. R. Crim. P. 32.2(b), as soon as practicable after a plea of guilty is accepted, on any count where forfeiture is sought, "the court must determine what property is subject to forfeiture under the applicable statute." Further, "the court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture action is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt." If the court finds the property is forfeitable (government demonstrates a sufficient nexus between the property and the offense), a preliminary order of forfeiture is entered. The preliminary order of forfeiture becomes final at the time of sentencing and must be included in the judgment and conviction order as well as the oral pronouncement of the sentence.

August 11, 2008.[3] (D.I. 41) Post-hearing briefing is complete. (D.I. 43, 44, 45) Before the court are two issues: (1) whether the firearms listed in count one of the indictment are forfeitable under 18 U.S.C. § 924(d); and (2) whether the forfeiture of said firearms would constitute an excessive fine under the Eighth Amendment of the United States Constitution.

II. FINDINGS OF FACT

1. In August 2007, defendant was the sole proprietor and owner of X-Ring Supply ("X-Ring"), a firearms and ammunition business located in Newark, Delaware. (PSR ¶8) The federal firearms license ("FFL") for X-Ring was held in the name of James L. Cheeseman (defendant). (Id.) As a holder of an FFL, defendant could send copies of his license to wholesalers, enabling him to order new guns at any time. (D.I. 46 at 18) At any given time, the store maintained an inventory of approximately 700 firearms, all of which were kept on the X-Ring premises. (PSR ¶10) Defendant also maintained a personal collection of firearms that he kept at the premises. (*Id.*) Defendant owned and operated X-Ring, including the sales of firearms and ammunition, from 1994 through August 2007. (D.I. 46 at 17-18)

2. The X-Ring premises included the retail gun store, with an adjacent office and bathroom. (*Id.* at

[3] The parties have agreed that there are no objections to the facts set forth in the Pre-Sentence Report ("PSR") and that the PSR may be made part of the record for purposes of the forfeiture determination. (D.I. 46 at 75-76)

20) On the side of the retail store building was a warehouse, with a store area and small office-type room. (*Id.*) Ammunition and gun boxes were stored in the warehouse. (*Id.* at 20, 49) Employees regularly entered the warehouse. (*Id.* at 49) The office in the warehouse had been converted into a living area, with an air mattress, sleeping bag and bedding. (*Id.* at 26, 47, 69, 73-74) Defendant was living in the store two to four nights per week, sometimes more, during 2005-2007.[4] (*Id.* at 46, 64, 68-69, 73) On multiple occasions, employees found defendant asleep in the store before morning opening.[5] (*Id.* at 69, 74)

3. X-Ring Supply was equipped with a nighttime security alarm and a 24-hour continuous video recorder. (*Id.* at 48-49, 54) The video system cameras were positioned in the store area, but not in the warehouse area. (*Id.* at 48-49) The video system was supposed to stay on at all times. (*Id.* at 54) At the end of each workday, employees were responsible for setting-up a tape for nighttime recording. (*Id.* at 50) On multiple occasions, employees would find that the video system had been shut down purposefully during the prior evening. (*Id.* at 50-51, 59) One at least one occasion, defendant told an employee that he had turned the system off. (*Id.* at 59) Frequently, defendant instructed employees not to turn on the night alarm at the end of the day. (*Id.* at 59, 60) On

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[4] Also living with defendant at X-Ring Supply was Charlotte Key ("Key"), purportedly a crack cocaine user. (D.I. 46 at 27, 47, 60, 68, 93)

[5] Key and another female, Marie Henderson ("Henderson"), were also found by employees in the store on mornings before opening for business. (D.I. 46 at 60)

at least one occasion, defendant told employees not to turn on the alarm because Ms. Key would be present in the store after hours. (*Id.* at 61)

4. Defendant began using cocaine sometime in 2003. (*Id.* at 27) In April 2005, defendant completed a renewal application for his FFL. (*Id.* at 28) In response to a question regarding drug use, (to be answered under penalties imposed by 18 U.S.C. § 924), defendant answered "No".[6] (*Id.* at 29; GX10 at 2) Had defendant responded affirmatively, his FFL would not have been renewed. (D.I. 46 at 29) Sometime in 2005, defendant's sister Nancy Macknatt ("Macknatt") was employed to perform book work at X-Ring. (*Id.* at 77-78) Macknatt obtained power of attorney on behalf of defendant sometime during 2006. She obtained power of attorney because of defendant's various health problems; she was unaware of his drug addiction. (*Id.* at 79) X-Ring operated through a single checking account solely in defendant's name and defendant held a debit card for the account. (*Id.* at 36) During 2006 and 2007, defendant made frequent ATM cash withdrawals from the business account. (*Id.* at 36-38; GX14) Defendant frequently withdrew cash from the ATM.[7] (*Id.* at 37-38; GX14) The frequent withdrawals concerned Macknatt. (*Id.* at 88)

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[6] Question 12 read: "Are you an unlawful user of, addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?" (GX10 at 2)

[7] For example, ATM withdrawal totals for: December 2006 - $ 12,961.95; January 2007 - $ 14,398.95; February 2007 - $ 14,697.50; March 2007 - $ 15,836.95; April 2007 - $ 14,793.90; and May 2007 - $ 17,047.90. (GX14)

5. During July and August of 2007, the day-to-day operations of X-Ring were managed by Macknatt and the store manager, Robert Henry. (*Id.* at 79-80) Defendant's presence at the store was sporadic and unpredictable. (*Id.*) Defendant's employees at X-Ring noticed his drug addition. (*Id.* at 69-70, 89-90) While none of the employees actually saw defendant using drugs, at least three crack pipes were found by the employees on the X-Ring premises. (*Id.* at 39) Defendant entered a rehabilitation center for 10 days sometime in June 2007.

6. In July 2007, defendant removed the personal firearms that he had been storing at the home of his ex-wife, Patsy Cheeseman. (*Id.* at 34-35) He relocated some of the weapons to X-Ring and stored the weapons, loose and unlocked, on top of a filing cabinet next to the bathroom. (*Id.* at 79, 89-92)

7. On August 5, 2007, at approximately 11:15 p.m., Delaware State Police ("DSP") officers observed a vehicle in the parking lot of an Eckerd's store in New Castle County after normal business hours. (PSR ¶11) The vehicle's front doors were open and defendant was observed walking around the vehicle waving his arms, as if involved in a verbal confrontation.

8. At the same time, Henderson was observed walking from behind the business tying her skirt closed. Officers surmised that Henderson had just urinated behind the business. (PSR ¶12) Henderson was taken into custody for lewdness and a search of her person and purse revealed: (1) a clear knotted bag containing crack cocaine hidden inside a box of

Winston cigarettes; (2) a crack pipe; and (3) a loose rock of crack cocaine.[8]

9. Defendant consented to a pat down search of his person. (PSR ¶¶14, 15) Officers found a crack pipe in his pocket, which was burnt at one end, suggesting that it had been used. Inside his shirt pocket, officers found a box of cigarettes containing three clear plastic bags, inside of which was a quantity of crack cocaine.[9] A search of the vehicle was conducted at the scene and an additional crack pipe was found on the center console of the vehicle.

10. DSP officers interviewed Henderson at DSP Troop 2 wherein she stated that the crack cocaine located in her purse was given to her by defendant. (PSR ¶¶18-23) She also averred that, shortly before being stopped by police, they met with an individual whom defendant had called for the purpose of obtaining crack cocaine. Henderson explained that defendant gave the drug dealer the money in exchange for the crack cocaine. After obtaining the crack cocaine, they immediately used some of it while seated inside the vehicle. Defendant and Henderson each had their own crack pipes which they used to smoke crack cocaine. Henderson said they had been using crack cocaine together for about a year. Defendant told the officers that he was trying to get help for his addiction and had just returned from a rehabilitation facility.

11. A federal search warrant was executed at X-Ring on August 14, 2007. The searching agents

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[8] Crack cocaine weighed 4.2 grams. (PSR ¶16)

[9] Crack cocaine weighed 10.5 grams. (PSR ¶16)

seized approximately 600 guns and ammunition that are listed in the indictment.[10] (PSR at ¶24) This includes a number of guns that were tagged as belonging to defendant's personal collection.[11] (D.I. 46 at 32) In a back warehouse room, which appeared to be used as a living space, agents also recovered: (1) a crack pipe, hidden inside an empty box of garbage bags; (2) a mirror with cocaine residue; (3) a burnt spoon with cutting agent residue;[12] (5) an ash tray containing white residue next to numerous rounds of ammunition; (6) a "push rod" for filling a crack pipe; and (7) a digital scale, with white residue, hidden inside a VCR.[13] (D.I. 46 at 22; GX3, GX4,

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[10] The government estimates the total value of these weapons to be approximately $371,500.00 (D.I. 43 at 4) Defendant estimates the total value as closer to $500,000.00. (*Id.*) Defendant estimates the value of the personal firearms in possession of the government at approximately $67,000.00. Two of the personal collection firearms are, according to defendant, "very rare and valuable" and worth an estimated value of $10,000.00 to $40,000.00 for the Kimber Classic K770 Model K0012 rifle and $15,000.00 to $50,000.00 for the Kimber Classic K770 Model K0005. (D.I. 44 at 5)

[11] A January 2007 compliance inspection conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives revealed defendant had transferred 68 guns from X-Ring Supply inventory to his personal collection. (D.I. 46 at 31-32; GX11) Only 42 of these guns were found in the store. (D.I. 46 at 33-34) Fourteen of defendant's personal firearms are unaccounted for. (D.I. 45)

[12] A cutting agent is a substance used to increase the volume of a quantity of cocaine for purposes of distribution. (D.I. 46 at 25)

[13] A digital scale is typically used to weigh drugs for distribution; a gun shop would have no need for a digital scale. (D.I. 46 at 24)

GX5, GX6) A butane torch was also found in the warehouse.[14]

12. Following his arrest on the charges at bar, defendant provided a hair sample, which was submitted for lab analysis. (PSR ¶26) The results of the test indicated that the sample was positive for both cocaine and cocaine metabolites, indicating that defendant was using cocaine for an extended period of time. (*Id.*)

13. In December 2007, defendant sold the assets of his business to his sisters Pamela Rhoades and Macknett for $150,000.00. (D.I. 39) As part of the agreement, defendant sold all the assets, including "all of the firearms, ammunition, and other business related material now in custody of the Federal government." (D.I. 46 at 94-96) Defendant has no interest in the business, now called X-Ring Supply LCC [sic]. (D.I. 44, EX4)

IV. [sic] FORFEITURE

A. 18 U.S.C. § 924(d)

Since forfeiture is not an element of the underlying crime, the government need only establish its right to forfeiture by a preponderance of the evidence. *United States v. Pelullo*, 14 F.3d 881, 901-06 (3d Cir. 1996). *United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 2003). Because criminal forfeiture is not automatic upon a conviction (in this

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[14] Such a torch would have no use in a gun shop; it is typically used to cook crack cocaine. (D.I. 46 at 25-26)

instance, entry of a plea), the government must establish a sufficient nexus between the offense committed and the property to be forfeited. *United States v. Sokolow*, 91 F.3d 396, 414-15 (3d Cir. 1996).

Forfeiture of firearms involved in a 18 U.S.C. § 922(g) offense is governed by 18 U.S.C. § 924(d)(1), which provides, "[a]ny firearm or ammunition involved in or used in any knowing violation of subsection . . . (g) . . . of section 922 . . . shall be subject to seizure and forfeiture."[15] Defendant argues that there is no evidence that he ever used or involved a firearm in any manner to facilitate his cocaine addiction. The court finds, however, that § 924(d) is satisfied by defendant's own admission that, from about August 5, 2007 to August 14, 2007: (1) he actually and constructively possessed the firearms and ammunition set forth in count one of the indictment; (2) he was a regular unlawful user of, and addicted to, cocaine base; and (3) the firearms and ammunition at issue affected interstate commerce. (D.I. 27 ¶3)

Further, it is clear from the evidence and testimony presented at the evidentiary hearing as well as the uncontested PSR that: (1) defendant has been using cocaine since 2003; (2) he was living and using crack cocaine at X-Ring; (3) during after business hours, defendant allowed users of crack cocaine to stay with him at X-Ring; (4) drug paraphernalia was found at X-Ring; (5) defendant lied about his addiction on his FFL renewal; (6) after defendant's FFL was renewed – on false pretenses –

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[15] Any firearms or ammunition deemed forfeitable must be destroyed or disposed of pursuant to 26 U.S.C. § 5872(b).

he continued to operate X-Ring, including purchasing and selling firearms; (7) he compromised the security of X-Ring by turning off the security alarm in order to allow himself and crack addicts into the retail store; (8) he stored his personal gun collection unsecured; and (9) although not actively involved in the day-to-day business of X-Ring, defendant used drugs on the premises and had unfettered access to the inventory of firearms and ammunition. Accordingly, the firearms and ammunition are forfeitable under § 924.

B. Eighth Amendment

The United States Supreme Court has concluded that the Eighth Amendment's Excessive Fines Clause is violated if a forfeiture constitutes a "punishment for some offense," but does not "bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 327 & 334 (1998) (citations omitted). Assessing whether a forfeiture is constitutionally excessive requires a comparison of the value of the property to the gravity of the offense. *Id.* at 323. If, however, the forfeiture is nonpunitive in nature, the Excessive Fines Clause is not implicated. *See Id.* at 329.

Defendant asserts that forfeiture of 600 or more firearms amounting to well over $500,000.00 is a grossly disproportionate punishment and unwarranted by the crime he committed. The court disagrees.[16] By his own admission, defendant

[16] In light of this reasoning, the court will not consider whether certain "valuable" firearms maintained in defendant's personal collection should be treated differently than the other firearms.

possessed all the firearms and ammunition listed in count one of the indictment. Each individual firearm and unit of ammunition could have been charged and forfeited as a separate offense under § 922(g). By consolidating the firearms into one count, defendant avoided exposure to additional special assessments and statutory fines. Consequently, the court finds forfeiture is not so grossly disproportionate as to violate the Eighth Amendment.

V. CONCLUSION

For the reasons stated, the court finds that all the firearms and ammunition identified in count one of the indictment are forfeitable under § 924(d)(1), and that forfeiture of the weapons does not violate the Eighth Amendment. An appropriate order shall issue.

PRELIMINARY ORDER OF FORFEITURE

IT IS HEREBY ORDERED THAT:

As the result of the defendant's guilty plea to Count I of the Indictment, for which the Government sought forfeiture pursuant to 18 U.S.C. § 924(d)(1), defendant shall forfeit to the United States all firearms and ammunition involved in the offense alleged in Count I. The Court has determined, based on the evidence already in the record, the defendant's plea agreement, and the evidence presented at a post-trial hearing on the forfeiture allegation in the Indictment, that all the firearms and ammunition set forth in Count I of the Indictment are subject to forfeiture pursuant to section 924(d)(1), and that the government has established the requisite nexus between such property and the violation of Title 18, United States Code, Section 922(g)(3) that is the subject of Count I.

Upon entry of this Order, the United States is authorized to commence any applicable proceeding to comply with statutes governing third party rights, including giving notice of this Order. The United States shall publish notice of the order and its intent to dispose of the property in such a manner as the United States may direct. The United States may also, to the extent practicable, provide written notice to any person known to have an alleged interest in the Subject Property.

Any person, other than the above named defendant, asserting a legal interest in the Subject Property may, within thirty days of the final publication of notice or receipt of notice, whichever is earlier, petition the court for a hearing without a

jury to adjudicate the validity of his alleged interest in the Subject Property, and for an amendment of the order of forfeiture.

Pursuant to Fed. R. Crim. P. 32.2(b)(3), this Preliminary Order of Forfeiture shall become final as to the defendant at the time of sentencing and shall be made part of the sentence and included in the judgment. If no third party files a timely claim, this Order shall become the Final Order of Forfeiture, as provided by Fed. R. Crim. P. 32.2(c)(2).

Any petition filed by a third party asserting an interest in the Subject Property shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the Subject Property, the time and circumstances of the petitioner's acquisition of the right, title or interest in the Subject Property, any additional facts supporting the petitioner's claim and the relief sought.

The United States shall have clear title to the Subject Property following the Court's disposition of all third-party interests, or, if none, following the expiration of the period provided by statute for the filing of third party petitions.

The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Fed. R. Crim. P. 32.2(e).

The Clerk of the Court shall forward four certified copies of this order to the assigned Assistant U.S. Attorney.

IT IS SO ORDERED:

Dated: 1/15/09

/s/ Sue L. Robinson

HONORABLE SUE L. ROBINSON

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 19 2010
OFFICE OF THE CLERK

No. 09-1470

In the Supreme Court of the United States

JAMES L. CHEESEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly determined that the criminal forfeiture of petitioner's firearms and ammunition did not violate the Excessive Fines Clause.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 600 F.3d 270. The opinion of the district court (Pet. App. 33a-45a) is reported at 593 F. Supp. 2d 682.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2010. The petition for a writ of certiorari was filed on June 1, 2010 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a plea of guilty in the United States District Court for the District of Delaware to one count of being a drug addict in possession of firearms

and ammunition, in violation of 18 U.S.C. 922(g)(3). Pet. App. 3a. The district court sentenced petitioner to eight months of imprisonment and three years of supervised release. *Id.* at 10a. In addition, the district court ordered petitioner to forfeit approximately 600 firearms and a quantity of ammunition. *Id.* at 3a-10a. The court of appeals affirmed. *Id.* at 1a-32a.

1. From 1994 through 2007, petitioner was the owner and sole proprietor of X-Ring Supply (X-Ring), a sporting goods and firearms store in Newark, Delaware. Pet. App. 4a. X-Ring maintained an inventory of approximately 600 firearms, all of which were kept on the premises, including in a warehouse located next to the store. *Id.* at 4a, 36a-37a. Petitioner also kept his personal collection of firearms on the X-Ring premises, and stored boxes of guns and ammunition in the warehouse. *Id.* at 4a, 36a.

In 2003, petitioner began to abuse drugs. Pet. App. 4a. Petitioner's addiction to crack cocaine worsened between 2005 and 2007, during which time he converted X-Ring's warehouse into his home. *Ibid.* Petitioner stored an air mattress, sleeping bag, and bedding inside the warehouse. *Ibid.* During and after business hours, petitioner occasionally permitted fellow crack users to stay in the warehouse and occasionally turned off X-Ring's security system to allow himself and other crack users easy access to the premises. *Id.* at 4a, 9a, 37a-38a.

In 2005, while he was abusing crack cocaine, petitioner completed a renewal application for his federal firearms license. Pet. App. 4a. On his application, petitioner stated that he did not unlawfully use narcotics. *Ibid.* Also in 2005, petitioner's sister assumed power of attorney over him and assumed management of X-Ring's daily operations in response to petitioner's erratic be-

havior. *Id.* at 5a, 38a-39a. Thereafter, petitioner's presence in the store was sporadic and unpredictable. *Id.* at 5a, 39a. On at least three separate occasions, employees found crack pipes on X-Ring's premises. *Id.* at 5a.

On August 5, 2007, police officers saw a woman urinating in the parking lot of a pharmacy. Pet. App. 5a. The officers found drugs on the woman, who was petitioner's companion. *Ibid.* Petitioner then consented to a pat-down search, during which the officers found a crack pipe and crack cocaine. *Ibid.* A subsequent search of petitioner's car yielded a second crack pipe and additional crack cocaine. *Ibid.* Federal agents later executed a search warrant at X-Ring, where they seized approximately 609 guns (approximately 67 of which were identified as constituting petitioner's personal collection) and ammunition. *Ibid.* The agents also found drug paraphernalia in the warehouse. *Ibid.*

2. On September 13, 2007, a federal grand jury returned a three-count indictment with notice of forfeiture charging petitioner with: (1) possession of a firearm by an unlawful drug user or addict, in violation of 18 U.S.C. 922(g)(3), 924(a)(2); (2) possession of more than five grams of crack cocaine, in violation of 21 U.S.C. 844(a); and (3) distribution of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 5a-6a, 34a. Pursuant to 18 U.S.C. 924(d)(1), the government sought the forfeiture of the 609 seized firearms and a quantity of ammunition that petitioner unlawfully possessed while he was addicted to drugs. Pet. App. 6a.[1]

After petitioner pleaded guilty to violating Section 922(g)(3), the district court held a hearing to determine

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[1] Section 924(d)(1) provides that "[a]ny firearm or ammunition involved in or used in any knowing violation of subsection * * * (g) * * * of Section 922 * * * shall be subject to seizure and forfeiture."

whether the guns and ammunition were forfeitable. Pet. App. 7a, 35a-36a. The district court concluded that petitioner's guilty plea satisfied the elements of a Section 924(d)(1) forfeiture. *Id.* at 8a-10a, 42a-44a. The court also rejected petitioner's argument that the forfeiture would violate the Eighth Amendment's prohibition of excessive fines. *Id.* at 44a-45a. Petitioner contended that the seized firearms were worth approximately $500,000, whereas the government contended that they were worth $371,000. *Id.* at 10a, 44a. Using petitioner's higher figure for the sake of argument, the district court concluded that the forfeiture was not so grossly disproportionate as to run afoul of the Eighth Amendment. *Id.* at 10a, 45a.

3. On appeal, petitioner challenged the forfeiture, arguing that the forfeited property was neither involved nor used in a knowing violation of Section 922(g), and that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Pet. App. 10a-11a. The court of appeals rejected both arguments. *Id.* at 11a-30a.

a. The court of appeals first rejected petitioner's statutory argument, holding that the guns at issue were "involved in" the commission of petitioner's Section 922(g)(3) offense within the meaning of Section 924(d)(1). Pet. App. 11a-21a. Petitioner does not renew his statutory arguments in his petition for a writ of certiorari.

b. Turning to petitioner's Eighth Amendment argument, the court of appeals noted that, in *United States* v. *Bajakajian*, 524 U.S. 321, 337 (1998), this Court had held that a forfeiture violates the Excessive Fines Clause if it is "grossly disproportionate to the underlying crime." Pet. App. 26a. In determining that the for-

feiture at issue in *Bajakajian* was unconstitutionally excessive, the court of appeals noted, this Court had considered the nature of the substantive crime; whether the defendant belonged to the class of violators for whom the statutory proscription was principally designed; the degree of punishment, including the maximum fine, recommended by the Sentencing Guideline; the maximum fine authorized by the pertinent statute; and the harm caused by the offense. *Id.* at 27a (citing *Bajakajian*, 524 U.S. at 337-339).

Applying the *Bajakajian* factors, the court of appeals first observed that illegally possessing firearms was not the only substantive crime associated with petitioner's misconduct; he was also abusing illegal drugs. Pet. App. 28a. The court went on to reject petitioner's contention that his crime was "victimless," instead concluding that petitioner's conduct presented a threat to the "public safety." *Ibid.* The court also observed that petitioner, "a crack cocaine addict with unfettered access to an arsenal of weapons and ammunition, who facilitated other crack cocaine addicts' access to that arsenal, squarely fits within the class of persons whose behavior the statute aims to criminalize." *Id.* at 28a-29a.

Finally, the court found that, even assuming that the guns and ammunition were worth $500,000, as petitioner contended, the forfeiture of that property was "not grossly disproportionate to the crime to which [petitioner] pled guilty." Pet. App. 29a. The court acknowledged that that amount was approximately 70 times more than the low end of the fine recommended by the United States Sentencing Guidelines, but noted that it was only seven times greater than the high end of the Guidelines' recommended fine. *Ibid.* By way of contrast, the court of appeals noted that the value of the

forfeited property in *Bajakajian* was 70 times greater than the high end of the Guidelines' recommended fine. *Ibid.* "In any event," the court of appeals concluded, "when considered in light of all the factors that *Bajakajian* instructs courts to consider, the fact that the worth of the guns is a larger sum than the Guidelines fine does not sufficiently outweigh the remaining factors that militate against a finding of unconstitutionality." *Ibid.* The court added that the value of the forfeited property was only twice as great as the maximum fine permitted by the statute. *Id.* at 29a-30a. The court concluded that "any discrepancy" between the value of the forfeited property and the Guidelines fine was "not controlling," and that the forfeiture amount was not "grossly disproportionate" to the Section 922(g)(3) offense in light of all the *Bajakajian* factors. *Id.* at 30a.

ARGUMENT

Petitioner asks this Court to review the court of appeals' holding that the district court's order forfeiting petitioner's firearms and ammunition did not violate the Excessive Fines Clause of the Eighth Amendment. That holding does not merit further review because the court of appeals properly considered all of the factors enumerated by this Court in *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998), and correctly concluded that the forfeiture was constitutional. In addition, the court of appeals' decision does not conflict with any decision from this Court or from any other court of appeals.

1. a. In evaluating petitioner's Eighth Amendment claim, the court of appeals adhered to the analysis this Court set forth in *Bajakajian*. In that case, the government sought forfeiture of $357,144 in currency that the defendant had attempted to transport out of the country

without reporting it, in violation of 18 U.S.C. 982(a)(1) (which requires an individual to report to the government when he is transporting more than $10,000 out of the country). The question before the Court was whether a forfeiture of the full $357,144 the defendant failed to report would violate the Excessive Fines Clause. After determining that the forfeiture in question was punitive (thereby triggering the protection of the Eighth Amendment), *Bajakajian*, 524 U.S. at 327-334, the Court stated that a forfeiture would violate the Excessive Fines Clause only if it was "grossly disproportional to the gravity of the defendant's offense," *id.* at 337. The Court then considered the fine at issue in that case, and concluded that it was grossly disproportional to the gravity of the reporting offense, and was therefore unconstitutional. *Id.* at 337-340.

In determining the gravity of the defendant's crime—the benchmark against which to measure the magnitude of the forfeiture at issue—the Court in *Bajakajian* considered a number of factors related both to the statutory prohibition involved and to the culpability of the particular defendant. The Court first examined the nature of the crime charged, concluding that it was "solely a reporting offense," 524 U.S. at 337, and was "unrelated to any other illegal activity," *id.* at 338. Second, the Court took account of the fact that the defendant did "not fit into the class of persons for whom the statute was principally designed," because he was "not a money launderer, a drug trafficker, or a tax evader." *Ibid.* Third, the Court compared the value of the forfeited property to the penalties dictated by the Sentencing Guidelines for the particular defendant. In that case, the maximum fine under the Guidelines was $5000 and the maximum sentence under the Guidelines

was six months, which the Court took to "confirm a minimal level of culpability." *Id.* at 339. Fourth, the Court noted that the maximum penalties authorized in the statute at issue also are "relevant" to the analysis, and concluded that Congress's authorization of a $250,000 fine and five years of imprisonment indicated that Congress did not regard the offense as "trivial." *Id.* at 339 n.14. Taking the third and fourth factors together, the Court explained that "the maximum fine and Guidelines sentence to which respondent was subject were but a fraction of the penalties authorized" by the statute, which "undercut[] any argument based solely on the statute, because [it] show[ed] that respondent's culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—[was] small indeed." *Ibid.* Finally, the Court considered the harm caused by the defendant's offense and concluded that it was "minimal," both because the government was the sole party affected and because the only harm inflicted was depriving the government of the information that the respondent failed to report. *Id.* at 339.

Petitioner argues (Pet. 9-10, 19-21) that the court of appeals erred in evaluating the factors considered in *Bajakajian* because it did not give greater weight to the maximum fine authorized by the Guidelines than it did to the maximum fine authorized by the statute, 18 U.S.C. 922(g)(3). Petitioner also argues (Pet. 10-18) that the approach taken by the court of appeals conflicts with the decisions of other courts of appeals. Petitioner is incorrect on both counts.

b. This Court in *Bajakajian* did not suggest that the differential between the value of forfeited property and the maximum fine applicable under the Guidelines must

be given more weight than any other factor relevant to the gross-disproportionality assessment. In the Court's own words, the Guidelines penalties "confirm[ed]" what was already reflected by other factors, namely, that the defendant's level of culpability was minimal in that case. 524 U.S. at 338-339. The Court did state that the disparity between the maximum Guidelines fine ($5000) and the maximum statutory fine ($250,000) would "undercut" any argument in support of the forfeiture that was based "solely" on the statutory maximum. *Id.* at 339 n.14. But the Court did not assign relative weights to the various factors it considered and did not suggest that the Guidelines maximum will invariably be more important than the statutory maximum or any other factor.

Nothing in the court of appeals' decision conflicts with the decision in *Bajakajian*. Like this Court in *Bajakajian*, the court of appeals considered all of the relevant factors in examining whether the value of the forfeited property was grossly disproportional to the seriousness of petitioner's crime. Pet. App. 28a-30a. Those factors included the nature of petitioner's criminal behavior, whether petitioner's crimes were victimless, and whether petitioner was the type of individual Congress had in mind when it enacted 18 U.S.C. 922(g)(3). Pet. App. 28a-29a. The court of appeals also considered the differential between the maximum fine recommended by the Guidelines ($75,000) and the value petitioner claimed for the forfeited property ($500,000). *Id.* at 29a. The court noted that the value of the forfeited property was less than seven times greater than the maximum Guidelines fine, while the value of the forfeited property in *Bajakajian* was more than 70 times greater than the maximum Guidelines fine. *Ibid.* (citing *Bajakajian*, 524 U.S. at 337-338). The court of appeals

considered the smaller differential in this case "in light of all the factors that *Bajakajian* instructs courts to consider" and concluded that "the fact that the worth of the guns is a larger sum than the Guideline fine does not sufficiently outweigh the remaining factors that militate against a finding of unconstitutionality." *Ibid.* The court of appeals also considered the maximum fine authorized by Section 922(g)(3) itself, noting that it was half as large ($250,000) as the assumed value of the forfeited property. *Id.* at 29a-30a. But petitioner errs in suggesting (Pet. 14) that the court of appeals erroneously gave "minimal weight to [petitioner's] Guidelines fine range." The court of appeals considered all of the factors enumerated in *Bajakajian*, and concluded that, in this case, the maximum fine recommended by the Guidelines was "not controlling" when weighed against all of the other relevant factors, including the maximum fine authorized by the statute. Pet. App. 30a.

Petitioner is incorrect (Pet. 16-21) that, in declining to give the maximum Guidelines fine controlling weight, the court of appeals failed to give petitioner the individualized consideration required by *Bajakajian*. Most of the *Bajakajian* factors consider the circumstances of the individual defendant, and the court of appeals gave full consideration to those factors here. *E.g.*, Pet. App. 28a (petitioner's criminal conduct); *ibid.* (petitioner "is exactly the type of individual for whom the statute was designed").

c. As petitioner notes (Pet. 12-16), some courts of appeals have suggested that the maximum Guidelines fine should carry more weight than the maximum statutory fine in evaluating the *Bajakajian* factors. See *Von Hofe* v. *United States*, 492 F.3d 175, 187 (2d Cir. 2007); *United States* v. *Beras*, 183 F.3d 22, 27 n.5 (1st Cir.

1999); *United States* v. *3814 NW Thurman St.*, 164 F.3d 1191, 1198 (9th Cir. 1999). But those cases do not conflict with the decision here, which does not hold otherwise. The court of appeals here merely found that the maximum Guidelines fine did not control the overall gross-disproportionality analysis, a point on which petitioner does not claim the circuits are divided. Nor is it apparent that the court of appeals gave greater weight to the statutory maximum fine than to the Guidelines maximum fine. On the contrary, the court of appeals expressly noted that it was weighing the Guidelines fine against "all the factors that *Bajakajian* instructs courts to consider." Pet. App. 29a. Petitioner identifies no court of appeals case holding or even suggesting that the maximum Guidelines fine should be the most important or controlling factor. Rather, courts have recognized that the weight accorded to the various factors should vary from case to case, depending on the circumstances. See, *e.g.*, *Von Hofe*, 492 F.3d at 186 (excessiveness determination is "fact-intensive"; it is "impossib[le to] establish a formula for an excessive fine with surgical precision"); *United States* v. *Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (*Bajakajian* test not "rigid"), cert. denied, 541 U.S. 936 (2004); *United States* v. *Carpenter*, 317 F.3d 618, 627 (6th Cir. 2003) (authorized penalties are "but one of several factors"), rehearing en banc granted and opinion reinstated in relevant part, 360 F.3d 591, 593 (6th Cir.) (en banc), cert. denied, 543 U.S. 851 (2004).

2. Petitioner also seeks review (Pet. 21-27) of the court of appeals' ultimate ruling (based on the factors enumerated in *Bajakajian*) that the forfeiture in this case did not violate the Excessive Fines Clause. Fur-

ther review of that ruling is not warranted because the ruling is fact-bound and correct.

In determining that the forfeiture of petitioner's firearms and ammunition did not violate the Excessive Fines Clause of the Eighth Amendment. The court first considered the nature of the criminal conduct at issue. Pet. App. 28a-29a. Section 922(g)(3) (which petitioner pleaded guilty to violating) prohibits the possession of firearms by an individual who is addicted to illegal drugs. As the court of appeals correctly noted, therefore, petitioner's illegal conduct involved not only the illegal possession of hundreds of guns, but also the abuse of illegal drugs. *Id.* at 28a. The court went on to conclude that petitioner "is exactly the type of individual for whom [Section 922(g)(3)] was designed." *Ibid.* Section 922(g)(3), the court stated, reflects Congress's "eminently reasonable" determination "that certain types of individuals, including drug abusers, mental incompetents, and violent felons, should not possess firearms." *Ibid.* Thus, petitioner, "a crack cocaine addict with unfettered access to an arsenal of weapons and ammunition, who facilitated other crack cocaine addicts' access to that arsenal, squarely fits within the class of persons whose behavior the statute aims to criminalize." *Id.* at 28a-29a. The court also noted that petitioner engaged in further illegal activity when he falsely certified on an application for renewal of his federal license to sell firearms (in violation of both 18 U.S.C. 924(a)(1)(A) and 18 U.S.C. 1001) that he was not an unlawful user of drugs or a drug addict. Pet. App. 29a.

Although no person was actually injured by petitioner's offense, petitioner's conduct created a high risk of serious harm. The evidence showed that petitioner was a long-time crack addict with unfettered access to

an arsenal of weapons and ammunition; that he used crack on the premises in which he stored his inventory; that he allowed other crack addicts to use drugs on the premises, affording them access to the arsenal; and that he deactivated the store's security system in order to facilitate the use of the premises by his crack-addicted friends. Pet. App. 4a-5a, 36a-42a.

The court of appeals also properly took account of the fact that the assumed value of the forfeited property ($500,000) was twice as large as the maximum fine authorized by statute ($250,000), see 18 U.S.C. 3571(b)(3), and nearly seven times as large as the maximum fine authorized by the Sentencing Guidelines for petitioner's offense level of 21 ($75,000), see Sentencing Guidelines §§ 2K2.1(a)(6) and (b)(1), 5E1.2(c)(3). In contrast, the value of the forfeited property in *Bajakajian* was 70 times as large as the maximum Guidelines fine. Nor does petitioner's offense level under the Guidelines—which are only advisory, see *United States* v. *Booker*, 543 U.S. 220 (2005)—adequately account for petitioner's status as a licensed firearms dealer entrusted by the government to operate his business safely and legally; his fraudulent renewal of his firearms license; the prolonged nature of the offense, during which petitioner continued to acquire firearms illegally; or the serious threat to the public safety created by petitioner's misconduct. Thus, proper consideration of the relevant factors supports the court of appeals' determination that the forfeiture was not grossly disproportional to the gravity of petitioner's offense.[2]

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[2] In addition, this case differs from *Bajakajian* because it involves the forfeiture of contraband. In *Bajakanian*, the defendant lawfully possessed the currency that he failed to report, and it was legal for him to remove the currency from the country. In the instant case, in con-

CONCLUSION

The petition for a writ of certiorari should be denied.

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trast, it was illegal for petitioner to possess every weapon he possessed while he was addicted to crack cocaine. The forfeiture of such contraband thus has a remedial purpose that militates strongly in favor of its constitutionality. See *Austin* v. *United States*, 509 U.S. 602, 621 (1993) (noting that this Court has "recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society"); see also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (Section 924(d) "furthers broad remedial aims").

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No. 09-1470

IN THE

Supreme Court of the United States

JAMES L. CHEESEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition misunderstands the purpose for which a statutory maximum fine may be "relevant" under *United States v. Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, it was relevant to aid the Court in assessing a defendant's individual culpability. In Respondent's view, however, it can be relevant as a separate "factor" that *disregards*, and can be weighed against, a defendant's individual culpability. (Br. in Opp. at 8.) This critical misunderstanding is the basis of the lower court's error and of the split among the Circuit courts.

I. The statutory maximum was not among the factors the Court considered in *Bajakajian*.

Outside of a single footnote, *Bajakajian* did not discuss the defendant's statutory maximum *at all*, let alone consider it as a factor in its gross-disproportionality analysis as Respondent claims. Its analysis looked instead to (1) the type of offense, (2) the offense's relationship to other illegal activities, (3) whether the defendant fits into the class of persons for whom the statute was intended, (4) the maximum Guidelines fine, and (5) the harm caused. *Bajakajian*, 524 U.S. at 338-39.

The Court only mentioned the statutory maximum in a footnote, and then only to respond to the dissent's view that the Court should defer "to the congressional judgment of what is constitutional" (i.e., to the statutory maximum) rather than look to the Guidelines. *Id.* at 339 n.14; id. at 350-51 (Kennedy, J., dissenting). The Court then identified two ways in which the statutory maximum fine could be relevant.

First, the statutory maximum fine could be relevant to show that Congress did not consider the offense to be "trivial." *Id.* at 339 n.14. That would, of course, be relevant to the first factor in the Court's analysis: the type of offense.

Second, the statutory maximum fine may be relevant to assist the Court in determining whether a defendant's Guidelines range reflects a relatively low level of culpability. Thus, the Court noted that "the maximum fine and Guidelines sentence to which [Bajakajian] was subject were but a fraction of the penalties authorized," which "show[ed] that [his] culpability relative to other potential violators of the reporting provision – tax evaders, drug kingpins, or money launderers, for example – [was] small indeed." *Id.* at 339 n.14. The context makes clear that the "maximum fine" referenced in this statement is the maximum *Guidelines* fine, and the "penalties authorized" are the maximum statutory fine and prison sentence.[1]

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[1] The Second Circuit recently noted that the words "maximum fine" here present an "ambiguity" and concluded that they refer to the maximum Guidelines fine. *See United States v. Castello*, 611 F.3d 116, 123 & n.7 (2d Cir. 2010). This is the only interpretation that makes sense. If "maximum fine" meant "maximum statutory fine," the statement would then say, nonsensically, that the maximum statutory fine is "but a fraction" of the maximum statutory fine. The only way to avoid that problem would be to interpret "penalties authorized" as including the forfeiture – but that would make no sense in this context because the size of a defendant's forfeiture does not convey any information about the culpability of "other potential violators of the reporting provision."

II. The lower court's reliance on the statutory maximum conflicts with *Bajakajian*.

Here, the lower court did not use the statutory maximum for either of the proper purposes noted in *Bajakajian*.

Instead, after it considered Mr. Cheeseman's Guidelines fine range, it compared his statutory maximum sentence to his forfeiture amount. Noting that the forfeiture was "only" double the statutory maximum, the court indicated that *for that reason* ("[t]hus") "any discrepancy between the value of the firearms and the Guideline fine is not controlling and therefore does not serve as the basis for finding an Excessive Fines Clause violation." (Pet. App. 29a-30a.) In other words, according to the lower court, where a defendant's forfeiture is not many times greater than the statutory maximum fine, this may trump a disparity between the Guidelines fine and the forfeiture.

The lower court's analysis not only lacks any basis in *Bajakajian*, it also conflicts with *Bajakajian*. As the Court explained in its footnote, the Guidelines help show an offender's individual culpability relative to other offenders. *Bajakajian*, 524 U.S. at 338-39 & n.14. To substitute the statutory maximum for the Guidelines fine as the lower court did wholly undermines this purpose. For no apparent reason, it treats a defendant as though he were the statute's worst offender, even if, like Mr. Cheeseman in this case, he is far from it.

Here, the lower court should have used the statutory maximum, if at all, to show that Mr. Cheeseman's culpability was relatively low in light of his $75,000 maximum Guidelines fine. Instead, it did

the opposite: it used this disparity as a reason to dismiss the Guidelines and treat Mr. Cheeseman as the worst offender possible under the statutory framework.

III. The lower court's approach provides much less protection of defendants' Eighth Amendment rights than *Bajakajian* intended.

The lower court's approach provides much less protection of Eighth Amendment rights than *Bajakajian* calls for because it effectively neutralizes the Guidelines as a factor in many cases. Wherever a defendant's forfeiture is less than or not many times greater than the statutory maximum, the court can, as in this case, use it to override a Sentencing Guidelines disparity.

It is true that the Guidelines are just one factor among several, but discounting the Guidelines puts a thumb on the scale on the government's side. And, as a forfeiture treatise has noted, this approach makes it all too easy for courts to "brush off excessiveness claims by comparing the amount of the forfeiture with the maximum fine authorized by the criminal statute." David B. Smith, 1-12 Prosecution and Defense of Forfeiture Cases P 12.11 (2010).

Contrary to Respondent's suggestion, Petitioner does not argue that "the maximum Guidelines fine should always be the most important or controlling factor" in determining the gravity of a Defendant's offense. (Br. in Opp. 11.) Nor does Petitioner deny that the "weight accorded to the factors var[ies] from case to case, depending on the circumstances." (Id.) Indeed, the Guidelines might warrant relatively little weight where, for example, a court varies upward from the Guidelines and imposes a steeper

fine than the Guidelines advise.[2] Petitioner only seeks to prevent courts from giving the statutory maximum, which should not even be a factor, undue weight vis-à-vis the Guidelines.

IV. The Circuits are split on this issue.

Respondent argues that the First, Second, and Ninth Circuits' position that the Guidelines should receive more weight than the maximum statutory fine, "do[es] not conflict with the decision here." (Br. in Opp. 10-11.) The discussion above reveals why this is not so.

The First, Second, and Ninth Circuits just do what *Bajakajian* did: they compare the Guidelines fine, not the statutory maximum, to a defendant's forfeiture. *See, e.g., United States v. Jose*, 499 F.3d 105, 112 (1st Cir. 2007) (comparing Guidelines maximum to forfeiture amount); *United States v. Castello*, 611 F.3d 116, 123 (2d Cir. 2010) ("[T]he relevant metric is the top of the Guidelines for the fine and for imprisonment."); *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999) ("As in *Bajakajian*, [the] potential penalties under the Sentencing Guidelines 'confirm a minimum level of culpability.'"). Taking that approach, these courts have sometimes found

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[2] Here of course, the Court did not vary upward; it varied downward and imposed *no* fine and *no* prison sentence beyond time served because of Mr. Cheeseman's extraordinary rehabilitation and "slim to [non-existent]" likelihood of recidivism. This undermines Respondent's argument that Mr. Cheeseman's Guidelines range did not "adequately account" for his conduct. (Br. in Opp. 13.) Indeed, the district court made no such finding.

forfeitures excessive even when they are less than the statutory maximum fine. (*See* Pet. 17.)

The Third, Fourth,[3] and Sixth Circuits, on the other hand, have compared a defendant's statutory maximum fine to the forfeiture amount. (*See* Pet. 14-16.) And now the Seventh Circuit has done this as well, in *United States v. Li*, 615 F.3d 752 (7th Cir. 2010). There, the defendant was fined only $10,000 for his crime of harboring an illegal alien, but suffered a forfeiture of his home worth $179,200. The court held that the forfeiture was proportional in light of the statutory maximum fine of $250,000: "Given the *potential punishment* the district court *could have* assessed, the forfeiture of Li's home is not so grossly disproportionate to the gravity of his convictions as to be excessive." *Li*, 615 F.3d at 757 (emphasis added). The Seventh Circuit made no mention of the defendant's Guidelines fine; the transcript from Li's sentencing, however, reveals that his offense level was twelve, corresponding to a fine range of just $3,000 to $30,000. Transcript of Sentencing Hearing at 10, *United States v. Li*, E.D. Wis. (2009) (No. 08-CR-212); U.S. Sentencing Guidelines Manual § 5E1.2(c)(3). By looking to the Defendant's "potential punishment" under the statute instead of his actual punishment or his Guidelines maximum, which would reflect his individual culpability, the Seventh Circuit found it easy to affirm the sentence. Had it looked to the Guidelines, as some other Circuits do, it might have

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[3] A recent Fourth Circuit case did look to the Guidelines rather than the statutory maximum, with no explanation of why it took a different approach from earlier case law. *See United States v. Jalaram*, 599 F.3d 347, 356 (4th Cir. 2010).

reached a different result. *See, e.g., United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1121-22 (9th Cir. 2004) ($100,348 forfeiture excessive where Guidelines maximum was $30,000 and statutory maximum was $250,000); *United States v. Beras*, 183 F.3d 22, 28-29 (1st Cir. 1999) (on plain-error review, $138,794 forfeiture excessive where Guidelines maximum was $30,000 and statutory maximum was $250,000).

The Seventh Circuit's decision illustrates the need for clarification of the law. In some Circuits, defendants lose Excessive Fines Clause challenges based on the "potential punishment" for the worst offender under the relevant statute, and courts practically never find forfeitures excessive. (*See* Pet. at 18.) In other Circuits, defendants do not have to overcome this substantial barrier, and courts sometimes do find forfeitures excessive. (*See* Pet at 17.) Because law-enforcement agencies continue to pursue civil and criminal forfeitures in a wide range of cases, this conflict affects courts on a daily basis, and its resolution is essential to ensure equal protection of constitutional rights across all Circuits, as well as to provide clarity and certainty for law-enforcement officials as they choose where and when to deploy enforcement and prosecutorial resources.

Petitioner is not alone in noticing this conflict and its importance. One forfeiture-law treatise laments the difference in the Circuits' approaches and now cites the lower court's decision in this case as further evidence of the split. *See* Smith, *supra*, P. 12.11.

This case thus presents the Court with an opportunity to eliminate the confusion and inconsistency in the federal courts regarding the

respective roles of the Sentencing Guidelines and statutory maximum fines in an Excessive Fines Clause gross-disproportionality analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

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